

Spring 2012

# Re-Focusing on Philanthropy: Revising and Re-Orienting the Standard Model

Rob Atkinson

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## Recommended Citation

Rob Atkinson, *Re-Focusing on Philanthropy: Revising and Re-Orienting the Standard Model*, 4 *WM. & MARY POL'Y REV.* 1 (2012),  
Available at: <https://ir.law.fsu.edu/articles/400>

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# Re-Focusing on Philanthropy: Revising and Re-Orienting the Standard Model

Rob Atkinson\*

*This paper undertakes a detailed analysis of today's standard theory of the philanthropic sector to provide a new model that is both more accurate in its details and more comprehensive in its scope. The standard theory sees the philanthropic sector as subordinate and supplementary to our capitalist market economy and liberal democratic polity. That approach has a fundamental short-coming: its explanation of both the state and philanthropy as adjuncts to the market fails to appreciate the ways in which all three sectors support and supplement each other. The standard model's primary focus on the market ignores how the demands that we make on both the state and the market ultimately derive from value systems the philanthropic sector not only gives us, but also prepares us to accept. From this perspective, the philanthropic sector functions, not as an adjunct to the state and the market, under those sectors' standards of consumer demand and majority preference, but rather as both their foundation and their metric.*

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### I. INTRODUCTION: APPRECIATING THE LIMITS OF THE STANDARD THEORY

Today's standard theory of philanthropy explains philanthropy as subordinate and supplementary to our society's other two public sectors, our capitalist market economy and our liberal democratic polity. The standard theory integrates the insights of neo-classical economics and political science both to define philanthropy's function and to measure its performance. But that approach to philanthropy, for all its inter-disciplinary analytic power and trans-sectoral scope, has several serious shortcomings. This paper undertakes a detailed analysis of the

standard theory of philanthropy as the basis for a new model that is both more accurate in its details and more comprehensive in its scope.

Part II examines the standard model in detail. That examination reveals that the standard model oversimplifies the relationship between the market and the state, emphasizing the state's market-supplementing functions and ignoring other state functions, particularly wealth redistribution, that run counter to the market's metric. As a result, it offers no global metric for reconciling conflicts between the market and the state's respective performance measures, wealth maximization and majority rule. Although the standard theory shows that the most distinctive function of the philanthropic sector is to provide just such global metrics, it offers no guidance for choosing among them.

Part III explains how these shortcomings of the standard model derive, in large part, from that model's sequential account of sectoral function. Starting with the for-profit sector, moving next to the governmental and finally to the philanthropic, this sequencing reflects the standard model's implicit assumption of the market sector's functional primacy. As a correction to this tendentious sequencing of sectors, Part III proposes an alternative, synoptic approach.

Part IV adopts that synoptic perspective to examine the three sectors not sequentially, but simultaneously. The first section highlights a basic point that the standard theory generally obscures: each sector in our society is fundamentally dependent on the other two, not just to correct its failures, but also to ensure its very existence. The standard theory, corrected for its implicit subordination of the governmental and philanthropic sectors, would see each sector of our society functioning to provide us what the other two cannot provide as well.

Even with that critical correction, however, the standard theory tends to omit another significant level of analysis. As we see in the second section of Part IV, a focus on preferences not for the products that the various sectors provide, but instead for the sector making the provision would strengthen the standard theory. Thus, as the standard model explains, some parents choose philanthropic schools as more economically efficient educators than schools in the for-profit or governmental sectors. But other parents choose philanthropic schools simply because they are not state schools; these parents, in other words, have both a first-order preference for education over other products and a second-order preference for philanthropies over other providers.

The final section of Part IV shows how these second-order preferences, like first-order preferences, can be traced back to the philanthropic sector itself in two critical ways. The value-systems of the philanthropic sector offer reasons for preferring education over other "products"; those value-systems also offer reasons for second-order preferences like that for private over public schools. But philanthropies also do more. In addition to offering consumers and voters systems of first- and second-order preferences, philanthropies also shape our preferences for those very systems.

Thus philanthropy does not, as the standard theory implies, merely offer us what we cannot get from the state or the market, according to their standards of performance. Philanthropy also tells us what we should want, and from what sector. Even more basically, the philanthropic sector conditions us to have those very wants. The standard theory thus takes us to philanthropy's most distinctive function: providing global value systems. With that insight, we see that, from the perspective of philanthropy itself, its function is not simply to provide us what the other sectors cannot. Rather, its function is to provide us with the means of evaluating and re-modeling both our society and ourselves.

## II. MODIFYING THE STANDARD MODEL OF PHILANTHROPY

This discussion of the standard model has three related tasks. The first, and most basic, is to outline the standard model, showing how it accounts for philanthropy's function as an adjunct to our capitalist market economy and liberal democratic government. The second task is to correct the deficiencies of the standard model. The third task is to show why the standard model, even when thus amended, cannot provide normative standards for philanthropy other than economic efficiency and majority preference.

In undertaking those triple tasks, this analysis follows the basic order of the standard model itself, considering first the for-profit sector, then the governmental, and finally the philanthropic. With respect to each sector, we will identify its function, extrapolate from that function a metric of performance, and identify the sector's failures in measuring up to its own standards. At each step we will also identify the standard model's limitations and adjust for them.

### A. THE FOR-PROFIT, VOLUNTARY SECTOR: OUR CAPITALIST MARKET ECONOMY.

Here we first identify the basic function of the capitalist market economy and the means it employs to accomplish that function. These means, we shall see, imply two metrics useful for our more specific purpose – to measure the performance of philanthropy. We shall also see, however, that both the basic function of market capitalism and its characteristic means impose their own limitations; to transcend those limits while preserving the basics of market capitalism, our society must assign critical functions to other sectors.

#### 1. *THE MARKET'S BASIC FUNCTION AND METRICS: MAXIMUM CONSUMER SATISFACTION (AT MINIMUM COST).*

Stated most strictly, the function of market capitalism is to provide consumers the most of what they want, at the lowest possible prices, relative to the other three sectors: the household,<sup>1</sup> the governmental, and the philanthropic.<sup>2</sup> Several significant implications flow from market capitalism's basic function. First, producers are subordinate to consumers. A capitalist market economy is primarily about consumer satisfaction and only secondarily about producer profit. Maximum return to capitalists' investment is not an end in itself, but merely the means by which investors are induced to finance production of what consumers want, at the lowest possible price.

This basic function, as we would expect, also implies metrics of performance. Two in particular will prove extraordinarily useful, but by no means wholly adequate, to our task of measuring the merits of philanthropy. The first of these metrics is both the most basic and the

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<sup>1</sup> For reasons I detail elsewhere, the standard model tends to omit the household sector. See Rob Atkinson, *Philanthropy's Function: A Neo-Classical Reconsideration*. For purposes of this paper, I follow the standard model's lead, referring to the household sector only when necessary to complete the picture.

<sup>2</sup> See BURTON A. WEISBROD, *THE NONPROFIT ECONOMY* 18 (1988) ("The main strength of private enterprise is its efficiency in meeting consumer demands at minimum costs."). Although specification of this maximum production at minimum cost goal works well enough for economic purposes, it can be faulted, from a political perspective, as intermediate rather than ultimate. The ultimate economic goal of market capitalism, from that perspective, is ensuring the optimal measure of citizen freedom from government. See F. H. A. HAYEK, *THE ROAD TO SERFDOM* (1949) (linking political and economic freedom). For reasons of economy (not to mention politics), the textual discussion omits these possible refinements. Later, we will suggest, more in line with classical political theory, that maximum satisfaction of existing wants dubiously ignore both production of better goods than consumers want and distribution of production to others than those able to pay market prices. See *infra*, Part III.b.2.b., Extra-Sectoral Problems: Shortfalls of the Market by Measures Other than Its Own.



most widely applicable: getting the job done, whatever the job is, at the lowest possible cost. This is “bang for the buck,” “outputs-for-inputs” efficiency. Since this metric compares the output of goods and services with the inputs required to produce them, a handy short-hand is “productive efficiency.” This is the sense of “efficiency,” for example, in Kenneth Karst’s classic article, *The Efficiency of the Charitable Dollar*.<sup>3</sup> It is by this metric that we generally judge the governmental sector inefficient, relative to other sectors, in producing goods and services; this was the sentiment President Obama instinctively reflected in his “it’s the Post Office that’s always having problems” gaffe.<sup>4</sup>

We can already begin to see why this is so when we consider the other measure implied in the function of market capitalism: consumer satisfaction. This second performance measure is less generally applicable, but more specifically tailored to the function of the market economy itself. It involves producing not just more, relative to input, but more relative to a very different standard: what consumers want. This is a matter, not solely of productive efficiency, but also of what economists call allocative efficiency.<sup>5</sup> These two different kinds of efficiency, related though they surely are, are not reducible to each other, a lesson that many a bankrupt manufacturer has learned to its chagrin. It is small comfort to become the lowest-cost producer of SUVs, just at the moment when consumers are all switching to subcompact hybrids.

Here, however, we must be very careful. Although economic efficiency is economists’ standard gauge of consumer satisfaction, actual consumer satisfaction is notoriously difficult to measure. It would require determining consumers’ true state of mind – a task difficult in practice, if not impossible in principle – at the individual, much less aggregate, level of analysis.<sup>6</sup> This is a problem that has long bedeviled the current most popular form of consequentialism, hedonistic utilitarianism, which takes maximizing pleasure to be the supreme good.<sup>7</sup> Bentham’s long-promised “felicific calculus”<sup>8</sup> has, alas, yet to be delivered.

Faced with this problem, economists have hit upon a radically simplifying, if admittedly distorting, assumption: equate how much satisfaction consumers really derive from a product

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<sup>3</sup> Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433 (1960); see also WEISBROD, *supra* note 2, at 33–41 (1988) (comparing for-profit, governmental, and nonprofit providers primarily in terms of “cost efficiency” and “production costs”).

<sup>4</sup> See Helene Cooper, *Obama Offers Reassurance on Plan to Overhaul Health Care*, N.Y. TIMES (Aug. 12, 2009) (“UPS and FedEx are doing just fine,” Mr. Obama joked. “It’s the post office that’s always having problems.”) There is, of course, a good deal more to be said here. As to the Postal Service in particular, see, e.g., WEISBROD, *supra* note 2, at 36 (“[D]iscussions of the comparative efficiency of the U. S. Postal Service and the private United Parcel Service typically fail to consider differences in the number of free pickup points, the variety of sizes of articles accepted, and the geographic distribution of delivery points.”); as to the general difficulty in assessing the relative productive efficiency of government, for-profit, and nonprofit providers, see Atkinson, *supra* note 1, at Part IV.

<sup>5</sup> See, e.g., Richard Steinberg, *Economic Theories of Nonprofit Organizations*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 119 (Walter W. Powell & Richard Steinberg eds., 2006) (“Markets can be inefficient because they waste resources by using the wrong production processes (productive inefficiency), but they can also be inefficient because they waste resources by producing the wrong mix of goods and services (allocative inefficiency).”); see also WEISBROD, *supra* note 2, at 18.

<sup>6</sup> RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 12 (3d ed. 1980). (“[I]t is difficult or impossible to compare the levels of utility which various individuals derive from their income . . . so that criteria based on such comparisons are not operational.”).

<sup>7</sup> See Arthur Allen Leff, *Commentary, Economic Analysis of Law: Some Realism about Nominalism* 60 VA. L. REV. 451 (1974) (summarizing the problem); see also SMART ET AL., UTILITARIANISM: FOR AND AGAINST (Cambridge Univ. Press 1973) (analyzing the problem in detail).

<sup>8</sup> JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION (1798).

with what they are willing and able to pay for it, then aggregate those amounts to determine “wealth.”<sup>9</sup> Economically appropriate outcomes – results that maximize consumer satisfaction – will be those that move resources into the uses for which consumers are willing and able to pay most. This, as two generations of economic analysis of law have proven, is an amazingly powerful, though woefully limited, metric; remember Mencken: “There is always a well-known solution to every human problem – neat, plausible and wrong.”<sup>10</sup> We take up the most serious of these problems in the next subsection, on the functions of government; now we must turn to a final implication of market capitalism’s function.

That final implication is perhaps the most important, at least for our purposes: the measure of for-profit performance is, at its very core, comparative. In identifying that function at the outset, we attached a critical condition: the for-profit sector is to perform its consumer-satisfying function better than any of the other three sectors. This is not to say that the market sector has any logical or chronological priority; indeed, once we introduce the comparative element, we can see that, looked at in another way, the market is, in fact, a response to the governmental, household, and philanthropic sectors’ failure to provide particular goods or services as well or better themselves. We cannot, then, either define the market’s function or assess its performance without reference to the other sectors.<sup>11</sup>

Consider primary education. As with many other goods and services, people could resort to household production; parents can, and do, home-school their children. But parents might do better – in economic terms, get more of what they want, more cheaply – by trading with their neighbors. This is my plan, which I plan to propose to you at a backyard barbecue at my place:

I read remarkably well and widely (if I do say so myself), but my handwriting is illegible and I can barely count without the aid of my fingers (and toes); you’ve told me you have a reading disorder so profound that you can’t add a short column of single-digit numbers, but I can see, from your RSVP, that your handwriting is virtually calligraphy; just between you and me, Jones down the block is atrocious at hand-writing, like me, and at reading, like you, but he seems to solve simultaneous quadratic equations without resort to pen and paper, much less pocket calculator. Here’s what I’m getting at: I’ll happily teach our children reading, if you’ll teach them to write; let’s see if Jones won’t do the math.

Even if you think my plan is an improvement on home-schooling in the strictest sense of each family educating its own children at home, we neighbors may be able to do better still. We three parents might find opportunities for specialization by comparative advantage well beyond those offered by our own respective abilities. We may well discover economies of scale and scope unavailable to us at home, all by the simple expedient of sending our children to school. The school teachers may be better in all three basic subjects than any of us, and each of them may be able to teach a dozen or more children in a classroom in addition to mine and yours and Jones’s. In selecting a suitable school, we would have three basic options: public, private, or for-profit. All things being equal – an assumption we will, of course, have to question in due course – we would choose the school that provided, as already suggested, the highest mastery of

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<sup>9</sup> See Leff, *supra* note 7, at 462.

<sup>10</sup> H.L. MENCKEN, PREJUDICES 2D 158 (1977); *see also*, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (Aspen Law & Business 2002).

<sup>11</sup> See WEISBROD, *supra* note 2, at 14 (“Every type of institution fails to be efficient under some circumstances.”).

the three “R’s” for the lowest cost.<sup>12</sup> Graded on that simple scale, a for-profit school might well score highest.

It is important to see why: The proprietors of the for-profit school get to keep any excess of revenues over expenditures; this gives them a direct economic incentive to operate at maximum “productive efficiency,” to get the most output for their inputs of teacher labor, bricks-and-mortar, and the other factors of educational production.<sup>13</sup> They get to keep the profits that result from cost-minimizing production, either to spend on their favorite consumer goods or to re-invest in still more production, and more profit; we parents get to keep the savings from their lower-cost tuition to spend on our own favorite consumer goods or invest in our own profit-maximizing enterprises. By seeking the most “bang” for our educational buck – they in production, we in consumption – we all come out ahead. The proprietors maximize profits; we parents, satisfaction. In this highly simplified scenario, then, the for-profit school functions best, measured by the market’s two related metrics, productive efficiency and economic efficiency.

But, of course, the market might not work nearly so well as we have imagined.<sup>14</sup> We now need to consider some of the general problems that might upset our little red, white, and blue schoolhouse, problems that suggest why our society needs to augment our capitalist market economy with the functions of other sectors.

## 2. MARKET PROBLEMS<sup>15</sup> AND THEIR MEASUREMENT.

The function of market capitalism, we have just seen, is to maximize aggregate consumer “satisfaction” or “wealth,” defined as the sum of what consumers are willing and able to pay. Wealth-maximizing allocations of resources are by definition “economically efficient,” the basic metric of the for-profit sector’s performance. Against that background, we can now turn to matters closer to our purpose: the limitations and failures of the for-profit sector. These, according to the standard theory, call for other sectors, even as limitations and failures in those sectors, in their turn, make the market itself necessary. We can identify four such problems, two in terms of the sector’s own function and metrics and two that imply other functions, with their own metrics. These distinctions are absolutely fundamental to a proper understanding of philanthropy; failure to draw them has been a major failing of the standard model’s account of the philanthropic sector.

### *a. Intra-Sectoral Problems: Shortfalls of the Market by Its Own Metric.*

The first set of problems with the market has this in common: They take both the function and the metric of the capitalist market economy as given. They grant, that is, these basic premises: We want our economy to give consumers the goods and services they

<sup>12</sup> To ensure that we bear those costs directly, and thus avoid an obvious problem of externalities, we can assume that our village has a generous voucher system.

<sup>13</sup> See WEISBROD, *supra* note 2, at 18 (“The attraction of profit is a powerful incentive for managers to seek lower production costs and products that more fully meet demands” as compared with both governmental and nonprofit providers.).

<sup>14</sup> What is more, this and other comparisons among sectoral providers may overlook critical differences in the goods and services provided. See WEISBROD, *supra* note 2, at 38 (suggesting that “there is systematic undercounting of the outputs (or quality) in public and nonprofit institutions,” with the result that “studies of comparative institutional efficiency are, in general, erroneous – biased in favor of private firms.”).

<sup>15</sup> The non-technical term “market problem” is meant to capture phenomena beyond the scope of the technical terms “market failure” or “market imperfection,” which I reserve for special treatment in Part III.b.1.a.ii, Classic Market Failures. For a parallel list of “market shortcomings,” see WEISBROD, *supra* note 2, at 21 (noting that “the shortcomings of the private market can occur in any of three areas – the choice of goods and services produced, production processes, and the distribution of outputs”).

themselves want; we measure their wants by their willingness and ability to pay for those products; we calculate the satisfaction of those wants by the metric of economic efficiency. Thus the two kinds of problems we examine here are problems with the market in its own terms, failures of the market to measure up to its own metric.

(1) *The Market's Foundations.*

The most basic limitation of market capitalism is its inability to create and sustain the essential conditions for its own existence. Although the extent of these conditions are much debated, only the most optimistic anarchists deny that they must include a legal regime with these three correlated features: recognition of private entitlements to resources, provision for voluntary exchange of entitlements, and protections against non-consensual interference with entitlements. These are, of course, the three main divisions of private law: property, contracts, and torts. As even the most libertarian of theorists admit, these are not institutions that can be achieved by private arrangements in any state of nature; law – and with it, property – requires a state.<sup>16</sup>

To appreciate this point, consider two radically different perspectives on the same “state of nature” situation, someone killing a deer. According to Locke, this example clenched his case for a natural, pre-social, right to private property: “Thus this Law of reason makes the Deer, that Indian’s who hath killed it; ‘tis allowed to be his goods who hath bestowed his labour upon it, though before, it was the common right of everyone.”<sup>17</sup> But, as Bentham pointed out, even this intuitively appealing case for private property in the state of nature poses a problem:

The savage who has killed a deer may hope to keep it for himself, so long as his cave is undiscovered; so long as he watches to defend it, and is stronger than his rivals; but that is all. How miserable and precarious is such a possession! If we suppose the least agreement among savages to respect the acquisitions of each other, we see the introduction of a principle to which no name can be given but that of law. A feeble and momentary expectation may result from time to time from circumstances purely physical; but a strong and permanent expectation can result only from law. That which, in the natural state, was almost an invisible thread, in the social state becomes a cable.<sup>18</sup>

As both Locke and Bentham implicitly agree, life in the “state of nature,” real or imagined, need not be as “mean, nasty, brutish, and short” as Hobbes famously insisted.<sup>19</sup> And, for all we can prove, humans in that state may well have “natural rights” to their own labor and whatever they can collect with that labor from the common store of previously uncollected stuff, even as Locke assumed.<sup>20</sup> But Bentham’s critical point still stands: To be secure, as a practical matter, in the enjoyment of what they collect, humans must have socially enforced property norms to protect their labor and its fruits, by force if necessary by some collective body. That body, whatever its form, is the rudimentary state; its mode of protection, be it ever so humble, is

<sup>16</sup> See RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND EMINENT DOMAIN* 3–4 (1985).

<sup>17</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 289 (Peter Laslett ed. 1988) (bk. II, ch. 5, § 30 lines 11–14).

<sup>18</sup> JEREMY BENTHAM, *THEORY OF LEGISLATION* 112–13 (4th ed. 1882).

<sup>19</sup> THOMAS HOBBS, *LEVIATHAN, OR THE MATTER, FORM, AND POWER OF A COMMONWEALTH, ECCLESIASTICAL AND CIVIL* 62 (1651).

<sup>20</sup> That said, the term in quotations drove Bentham to paroxysms of distraction: “Natural rights are nonsense; natural and imprescriptible rights, nonsense on stilts.” See *Anarchical Fallacies; Being an Examination of the Declarations of Rights Issued During the French Revolution*, in 2 *WORKS OF JEREMY BENTHAM* 501, col. 1 (1843).

recognizable law. And law, as Bentham brilliantly saw and even latter-day Lockeans concede,<sup>21</sup> cannot be created by contract – agreement presupposes a pre-existing regime of recognized rights, including the right to enforce agreements.<sup>22</sup>

To return to our education example, consider this hypothetical about a private proprietary school, from a very old common law case: “But suppose Mr. Hickeringill should lie in the way with his guns, and frighten the boys from going to school, and their parents would not let them go thither; surely that schoolmaster might have an action for the loss of his scholars.”<sup>23</sup> What holds true for Locke’s deer holds all the more true for our school master’s pupils: Without law, anyone is free to take them with impunity, by any means at hand, fair or foul, force included. And so, too, without law our schoolmaster will lose not only his students, but quite likely his schoolhouse, even his liberty, or his life. This, then, is the first and most basic problem of the market: It cannot create and sustain the fundamental conditions for its own existence and operation; for that, the market must have the state and its laws.<sup>24</sup>

## (2) *Classic Market Failures.*

Even with its legal foundations in place, market capitalism, left to its own devices, does not do as well as it might, measured by its own special metric, economic efficiency. Sometimes markets fail to produce efficient outcomes – the allocation of goods and services dictated by what consumers are willing and able to pay. For our purposes, the sources of the most significant of these technical market failures are twofold: information asymmetries<sup>25</sup> and externalities.<sup>26</sup> Our elementary education example nicely illustrates both.

### (i) *Information Asymmetries.*

In our original example, all three of us parents – you, Jones, and I – were willing and able to pay for our children’s elementary education. We want what is best for them, and we know that education is a real leg up in our society. But, alas, we may not really know what is best when we see it, except in the crudest possible way, when it may be too late, after our children’s school days are over. Here, the for-profit school poses a very real problem: since its proprietors get to keep any excess of revenue over expenditures, they have a perverse incentive – perverse by the standards of the market itself – to trade on our difficulty, as parents, in measuring mastery of the three Rs. If the school’s owners can skimp on input expenditures – by hiring fewer or inferior teachers, for example, or buying shoddy building materials – they can “over-charge” us for an inferior product. Public and philanthropic schools, by contrast, have no such incentive to

<sup>21</sup> See EPSTEIN, *supra* note 16, at 15 (“To make the Lockean conception [of the state’s origin] viable, it is necessary to abandon the idea of tacit consent as a source of contractual obligation.”).

<sup>22</sup> *Id.* at viii (“C’s right to enter into a contract with D cannot be acquired by a contract between themselves.”).

<sup>23</sup> *Keeble v. Hickeringill*, 11 East 574, 103 Eng. Rep. 1127 (Queen’s Bench 1707), citing 11 Henry IV 47 (1490).

<sup>24</sup> See also MUSGRAVE & MUSGRAVE, *supra* note 6, at 6 (“More generally, the contractual arrangements and exchanges needed for market operations cannot exist without the protection and enforcement of a governmentally provided legal structure.”).

<sup>25</sup> See WEISBROD, *supra* note 2, at 19 (“Lack of information is a major source of dissatisfaction with the proprietary form of institution.”).

<sup>26</sup> See WEISBROD, *supra* note 2, at 19–20 (“The market mechanism also fails . . . when consumers demand collective-type services or when production or consumption of a commodity has ‘external’ effects – on persons other than the buyers and sellers; profit-motivate firms will not take into account any effects of their activities that do not influence their revenues or costs.”).

skimp and thus may – assuming they avoid their own perverse incentives<sup>27</sup> – offer more education for our tuition dollar.

There are, of course, other ways to address this particular form of market failure: state regulation of primary education; philanthropic “watch-dog” groups like the Parent Teacher Association (PTA); inculcation in teachers, by the state or by institutions of the philanthropic sector, of a professional ethos.<sup>28</sup> The point here is that, on account of for-profit suppliers’ incentive to trade on information asymmetries, – consumers’ relative disadvantage in evaluating the product – the market, without some kind of correction, may under-perform by its own standard of maximizing consumer satisfaction. By trading on our relative ignorance about primary education, our for-profit school may well give us less than we are paying for and thus perform inefficiently.

(ii) *Externalities.*

The market may also under-perform by its own metric for a very different reason. Some of the costs or benefits of a product may not fall on its consumers. Economists call these costs and benefits externalities because they are external to the individual consumer’s calculation of satisfaction; they are costs the consumer does not have to bear, or benefits the consumer does not get to enjoy. To see why externalities can cause the market to fail – again, by its own metric, economic efficiency – consider, again, our elementary school example.

We all know that our children will be better off if they master the basic skills of reading, writing, and arithmetic; they will be better-remunerated producers when they grow up, and thus they will command higher incomes with which to seek their own satisfactions in the marketplace. By the same token, however, we as conscientious parents, might be less enthusiastic about, or even skeptical of, other elementary school offerings like, let’s say, civics or social studies.<sup>29</sup> The problem with these courses, from the parents’ child-benefit perspective, is that they seem primarily designed to provide our children not skills they can bring to market, but virtues that make the public at large better off. These latter benefits are spread widely over the economy and society as a whole; the parents who pay for them sow where they will not reap – or, alternatively, miss an opportunity to reap where they have not sown. If we as a society want an optimal level of investment in civics and social studies education, we may well have to look

<sup>27</sup> On the comparable limitations of nonprofit and governmental suppliers, see *infra*, Part III.b. See also WEISBROD, *supra* note 2, at 15 (“In nonprofit and governmental organizations, because sharing in organizational profit is restricted, profit is not the lure to efficient behavior that it is in the for-profit economy.”).

<sup>28</sup> See Michael Krashinsky, *Transaction Costs and a Theory of the Nonprofit Organization*, in THE ECONOMICS OF NONPROFIT ORGANIZATION 114, 116–17 (K. Clarkson and D. Martin eds.) (1980) (alternatives to nonprofit organizations as responses to market failure include professionalism, government regulation, and various for-profit arrangements such as franchising); See also Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 868–72 (1979) (noting classifications of nonprofits); Henry B. Hansmann, *Economic Theories of Nonprofit Organizations*, in THE NONPROFIT SECTOR 27, 30 (Walter Powell, ed., 1987) (same); Henry B. Hansmann, *The Rationale for Exempting Nonprofit Organizations from the Corporate Income Tax*, 91 YALE L.J. 54, 70–71 (1981) (noting that for-profits could be “outlawed entirely,” “or at least put under severe regulatory restraint” in industries where they are prone to exploit consumers); see *infra*, Part IV.

<sup>29</sup> Even learning the three R’s is likely to produce external benefits, as we shall see later; a literate worker is likely to be a more productive employee, even as a literate voter is likely to be a more discerning citizen. Elementary education, like many other goods, is neither purely “private” nor purely “public,” but “mixed”; it entails benefits both internal and external to its purchasers. See MUSGRAVE & MUSGRAVE, *supra* note 6, at 9 (education as example of mixed good); *id.* at 78–80 (explaining and illustrating concept of mixed goods). But more of the benefits of elementary education are likely to be “internal” to the student, at least as compared to civics (although, quite likely, the students themselves will also benefit from that course, too, if not as much as from the others). See *id.* at 9 n.1.

for it beyond the level likely produced in private market transactions between for-profit schools and tuition-paying parents.

In its own terms, then, the market falls short in two distinct ways. Most basically, the market cannot create and sustain its own foundation, a legal system of tradable property rights. What is more, even when that system is “up and running,” it cannot independently avoid inefficient allocations of resources on account of two classic kinds of market failure: information asymmetries and externalities. And these shortfalls, serious though they are, are only the beginning.

*b. Extra-Sectoral Problems: Shortfalls of the Market by Measures Other than Its Own.*

Our analysis of both of the problems we have just identified – the market foundation problem and the market failure problem – accepts as sound the basic goal of the capitalist market system: satisfying consumer demand. Our analysis of those two problems also takes the market’s own measure, economic efficiency, as appropriate. Another set of problems arises when we look at that system in terms of two other widely accepted social goals: equity of wealth distribution and optimal development of human potential. These two goals are quite explicitly defined out of economists’ focus by the two basic conditions of economic efficiency: consumer (1) ability and (2) willingness to pay for goods and services at the market price. Once we look behind these intuitively appealing conditions, we find two eminently plausible functions that a market economy, even functioning at its most efficient, cannot perform on its own: redistributing wealth and promoting excellence.

*(1) The Consumer “Ability to Pay” Criterion and the Market’s Indifference to Wealth Distribution.*

The function of market capitalism we have repeatedly seen is to satisfy consumer demand for goods and services. Here we need to examine more closely a peculiar aspect of how economic analysis defines consumer demand. Under that definition, consumers demand only what they are both (1) willing and (2) able to pay for. To avoid hopeless complications in determining what consumers really need or want, economists make the simplifying assumption, that consumers put their money where their mouths are. This technical notion of consumer demand is both intuitively appealing and analytically useful; we have already used it to show both strengths and weaknesses of the market’s provision of goods and services, like elementary education, for example.

Here we need to note a very peculiar feature of the definition of consumer demand, absolutely vital to understanding the role of both government and philanthropy, vis-à-vis the for-profit sector. To cast that peculiarity in highest relief, consider this corollary of economic analysis: starving children have no demand for bread. Under rigorously applied economic analysis, it is better – more economically efficient – for a wealthy bird-lover to feed day-old bread to pigeons in the park than for that bread to feed starving children about whose fate the world’s wealthy are indifferent: wealthy bird-lovers’ demand for bread is measured by the price they are willing and able to pay for it; starving children’s demand is measured by the same standard. The problem is that economists must count the children’s demand at zero because the children have no money, and thus no ability to pay. Although we intuit that the children would be willing to pay more than bird-fanciers, on account of their hunger, their need counts for nothing in economic terms if not conjoined with the other condition of measurable demand, ability to pay. And thus we prove, by economic analysis, the odd proposition that puzzled us at

the outset. Starving children have no demand for bread, because demand must include ability to pay. *Quod erat demonstrandum*.<sup>30</sup>

Of course, to be fair, the world's wealthy are not entirely indifferent to the plight of starving children, and economic analysis duly notes that concern. If the wealthy who are concerned about starving children are willing to pay more for day-old bread to send to children than to feed to birds, the bread will go to the feeders of children rather than the feeders of birds, as it should. It is not, in other words, that starving children do not count in economic analysis; it is, rather, that they count only as much as the relatively wealthy care to make them count. On their own, again, starving children have no demand for bread. On the supply side, as it were, market capitalism gives us supermarkets, fast-food emporia and gourmet restaurants, but no soup kitchens or "second harvests" because there is, technically speaking, consumer demand for the one, but not for the other. Only when we treat the donors to soup kitchens as those with demand for its provisions, do we account for them in economic terms.<sup>31</sup> In terms of economic efficiency, this is as it should be.

Starving children may, we should note, have one thing going for them besides the sympathy of the wealthy. Depending on the regime under which they live, they may be entitled to the market value of their labor. An enterprising waif might, for example, be able to sell his or her labor and use the proceeds to buy bread. With that stated, willingness and a legally-protected entitlement to pay with his or her own labor, the starving child can enter the market for bread (and re-enact the plot of an Oscar-winning movie).<sup>32</sup> Not to put too fine a point on it, our enterprising child might, borrowing a page from Adam Smith, specialize by comparative advantage. We read in our paper of record that Bangkok has a highly developed range of niche markets.<sup>33</sup>

But, enough about Asia. Let's return, with our education example, to a less disturbing domestic setting. As Progressive social engineers long ago argued, and as our Supreme Court has recently re-affirmed, elementary education has much to recommend it as an alternative to child labor.<sup>34</sup> As we have seen, parents who are concerned about the welfare of their children typically pay, willingly enough, for their children's primary education. But, of course, even if we assume all parents are willing to pay – an assumption we will remove soon enough – some parents are obviously unable. What holds for bread and poor children starving also holds for education and indigent child illiterates: they have no demand, discernible by economists' technical measurement, for the goods and services that other modes of analysis – not to mention basic instincts of human empathy – suggest they need. The market, in an obvious sense, fails to meet that need, but that failure is not, technically speaking, a "market failure." But, accordingly, if we want to meet that need – if we want to provide impoverished children with things they

<sup>30</sup> See Steinberg, *supra* note 5, at 128 ("It [efficiency] says nothing about how the pie is shared by consumers, about distributional justice.").

<sup>31</sup> Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 521–23 (1990), citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 30 (7th ed. 2007).

<sup>32</sup> See *SLUMDOG MILLIONAIRE* (Warner Bros. 2008).

<sup>33</sup> See, e.g., Marlise Simmons, *The Littlest Prostitutes*, N.Y. TIMES (Jan. 16, 1994); see also *Ending the Demand Side of Prostitution*, N.Y. TIMES (Sept. 30, 2012).

<sup>34</sup> Or, more precisely, child labor in factories owned by strangers; the Supreme Court itself has certified child labor on family farms as salubrious, especially as compared to public schools. *Wisconsin v. Yoder*, 406 U.S. 205, 224 (1972) ("[T]he Amish accept the necessity for formal schooling through the eighth grade level, but continue to provide what has been characterized by the undisputed testimony of expert educators as an 'ideal' vocational education for their children in the adolescent years.").



cannot afford to buy for themselves, including basics like education, even food – we cannot rely on the market and its metrics alone.<sup>35</sup>

(2) *The Consumer “Willingness to Pay” Criterion and the Market’s Indifference to the “Goodness” of Goods.*

The other side of the economists’ dual criterion of consumer demand, “willingness to pay” presents a problem of its own. Like its “ability to pay” counterpart, this criterion offers an intuitively appealing solution to a very real problem, a problem that lies very near the core of our inquiry. The former criterion deals with a quantitative problem: How much satisfaction are consumers actually getting? The answer is basically, however much they can buy. This latter criterion, by contrast, addresses a qualitative problem: Which satisfactions are better than others? The economists’ answer to the question of kind is the same as their answer to the question of amount: The better satisfactions, like the bigger satisfactions, are none other than those for which consumers are willing (and able) to pay the most.

This profoundly plutocratic answer, straightforward on its face, has a less obvious, but probably more important, corollary: No satisfactions are, as a matter of economic analysis, inherently better than others; their relative worth is strictly a matter of what consumers will (and can) pay for them.<sup>36</sup> In adopting this starkly monetized standard, economic analysis avoids a problem that has long bedeviled utilitarianism, its consequentialist cousin: Are all pleasures created equal? Jeremy Bentham, founder of the school, thought they were; John Stuart Mill begged to disagree with the master, famously declaring, “It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied.”<sup>37</sup> Contemporary economic analysis emphatically sides with Bentham and, by implication, with pigs and fools, with the refinement that their “ability to pay criterion” both separates the literal from the figurative pigs<sup>38</sup> and provides a ready substitute for Bentham’s “felicific calculus.”<sup>39</sup>

Mill’s invocation of Socrates could not be more apt for our purposes. Consider, again, our elementary school example. If allowed to indulge their own preferences, most children would not attend school, period. We, their parents, tend strongly not to indulge that childish preference. That is what paternalism is all about. Some of us like to think of this, not as imposing our own preferences, but rather as deferring to the longer-term preferences of our children themselves, what they themselves will want when they, too, are adults. Attending school, though it involves a huge deferral of gratifications, more than makes up for this front-end-loading of costs with increased benefits later, not least, through a higher cumulative earning capacity.

<sup>35</sup> See WEISBROD, *supra* note 2, at 34 (“A society’s choices among forms of institutions does not depend on [economic] efficiency alone; considerations of equity may also matter.”).

<sup>36</sup> See MUSGRAVE & MUSGRAVE, *supra* note 6, at 85 (“Policies to provide merit goods, or to deter the provision of de-merit goods, cannot be explained in terms of . . . social-goods theory” of standard economic analysis.).

<sup>37</sup> JOHN STUART MILL, UTILITARIANISM 14 (Oskar Priest ed., 1957); see also MUSGRAVE & MUSGRAVE, *supra* note 6, at 83 (recognizing “that the quality of wants may differ” because “[s]ome are concerned with the more noble and others with the baser aspects of life”).

<sup>38</sup> Only, to be fair, with metaphorical pigs; Richard Posner, scornful of classical utilitarianism, mocks the pleasures of animals. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (7th ed. 2007). A great strength of economic analysis, in his view, is that the ability to pay criterion takes animals out of the market – more precisely, out of the demand side of the market. At least some utilitarians, Peter Singer chief among them, are willing to go pretty much “whole hog” in counting animal’s feelings, especially their pain, very much in the market. See PETER SINGER, ANIMAL LIBERATION (1975).

<sup>39</sup> See Leff, *supra* note 7 (review of POSNER, ECONOMIC ANALYSIS OF LAW).

The point to see here is that some of us parents – myself emphatically included – embrace a much more robust paternalism. We have come to believe, with Socrates, that an unexamined life is not worth living and that, to look on the brighter side, the fullest human flourishing requires the widest and deepest possible exposure to what we call, with extravagant self-confidence if not condescension, the humanities. We predictably pay a lot to give our children what we call “liberal education.” We disdain the Dixie Chicks in favor of Dvorak (although, truth be told, we did “dig” their “dissing” of “W”). To paraphrase the Hebrew National Packing Company, we answer to authorities higher than our appetites, standards above the market; we, with Socrates, scrupulously eschew the porcine (if not always the pork).

The market, we must be careful to note, is quite capable of accommodating our *soi-disant* superior tastes. It offers Volvos as well as Fords (even though, somewhat to our embarrassment, Ford bought Volvo); it ensures that, somewhere down the street from every Toyota, Nissan, and Honda dealer, we will find, under separate management, respectively, the Lexus, Infiniti, and Acura franchises. The market, again, is more than willing to indulge our “higher” tastes (as long as we can afford them).

And so it is with education. We can insist that our children’s elementary school offers art and music as well as the three “Rs,” even as we can insist that law school cover jurisprudence, legal history, and the economic analysis of law, not just the black letter of the common law, the modern codes, and the Constitution. Those additions will necessarily make education more expensive; some of us think it worth it. We believe well-rounded education enables our children to be more fully realized people, that it compels our lawyers and judges to face questions of justice, not merely legality.<sup>40</sup>

What the market cannot do is give us any guidance of its own in matters of higher tastes and superior satisfactions.<sup>41</sup> By its basic “willingness to pay” criterion, again, all goods and services are worth exactly what we are willing and able to pay for them, not a penny more or less. The capitalist market gives us for our marginal dollar exactly and only what we want; it cannot, consistent with its own function and that function’s basic metric, direct us to anything higher or better. No metric derived from the market can tell us whether, in a budget crisis, we should drop music or football from our school’s offerings, whether, in our assessment of law schools, we should look to factors other than placement statistics and bar passage rates.

The same limitation, we should also note, applies to the supply side, albeit derivatively. If *Spiderman VII* outsells Sundance prize-winners (not to mention *cinema verite* classics), *Spiderman* is what the profit-maximizing multiplex will offer on the big screen. The same considerations determine what the networks, cable, and satellite offer on the small screen. And so it will be with our for-profit school, to the extent that its curriculum is set by parental preferences, and for the expanding ranks of proprietary law schools. Capitalists – as capitalists do – put their capital where it would generate the highest returns (discounted for risks), anywhere and everywhere in the world. From the perspective of the standard model, the for-profit sector’s function is not to make investors richer, but to induce them to give us what we want; enriching them is a means to the end of getting them to supply us. The point to see here is simply that what they are to give us is precisely what we are willing and able to pay most for, not what they

<sup>40</sup> See Rob Atkinson, *Law as a Learned Profession: The Forgotten Mission Field of the Professionalism Movement*, 52 S.C. L. Rev. 621 (2001).

<sup>41</sup> MUSGRAVE & MUSGRAVE, *supra* note 6, at 320 (“In this case [that of taxing ‘demerit’ goods and subsidizing ‘merit’ goods], the usual efficiency argument based on free consumer choice is inapplicable and social preferences are substituted for private choice.”).

think we should have, or want. As to that, nothing in market capitalism offers capitalists any better insights than it offers consumers. The market, functioning optimally, rewards producers if and to the extent that they satisfy consumers; it is totally indifferent to whether they improve buyers by any standard but the buyers' own. The market, in other words, is as indifferent to excellence as it is to need; if either is not backed by consumer dollars, it simply does not count. And so the market is very likely to leave Socrates dissatisfied, even as it leaves penniless children hungry.

### 3. *THE FOR-PROFIT SECTOR'S FUNCTION AND FAILINGS: THE BALANCE SHEET.*

According to the standard theory, the for-profit sector, our capitalist market economy, performs a highly specific function, satisfying consumer demand for goods and services at the lowest possible cost. That function, in turn, implies two metrics, productive efficiency and economic (or allocative) efficiency. Under those metrics, in the production of a more or less wide range of goods and services, the for-profit sector outperforms all the other sectors. Left to its own devices, however, the for-profit sector has its limits. It cannot create and sustain its own foundations, the legal regime of private property, and it cannot prevent inefficient production in the face of two basic kinds of market failures, information asymmetries and externalities. Nor can it advance two arguable social goods wholly outside its basic mission and beyond its metric: ensuring equitable distribution of wealth and encouraging the production of excellent, as opposed to popular, goods and services. If we are to transcend these limits of the for-profit sector, we must look to other sectors. Following the standard theory, we will consider first the governmental sector, then the philanthropic sector.

### B. THE NONPROFIT, NON-VOLUNTARY SECTOR: OUR LIBERAL DEMOCRATIC STATE.

Our expansion of the standard model sees the general function of the governmental sector as offering solutions to each of the problems the market sector (as well as yet-to-be identified problems in the other two sectors); each of these solutions implies a specific function of government.<sup>42</sup> Earlier versions of the model tended either to lump these functions together or to ignore some of them entirely.<sup>43</sup> Isolating them gives both a better sense of government's functions and better metrics of its performance. This is important because the functions of government, like that of the market, are themselves subject to distinctive kinds of limitations or

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<sup>42</sup> There is nothing sacrosanct about numbering governmental functions at four. Thus, for example, MUSGRAVE & MUSGRAVE, *supra* note 6, at 6–17, identify three basic functions, allocation, distribution, and stabilization. The first two correspond to its regulatory and redistributive functions, respectively. Musgrave and Musgrave also acknowledge its Ricardian and aretist functions, though their analysis assigns them lesser roles. See *id.* at 6 (“the contractual arrangements and exchanges needed for market operation cannot exist without the protection and enforcement of a governmentally provided legal structure”); *Id.* at 9 (noting that “in some instances, government decides to interfere with consumer preferences” by subsidizing goods considered meritorious and taxing goods considered harmful, and that this practice requires explanation outside their three-function framework). My analysis, in turn, does not deny the existence of their stabilization purpose; it simply leaves that function aside as not warranting treatment in the context of an analysis of philanthropy or assimilates it to the regulatory function.

<sup>43</sup> See, e.g., WEISBROD, *supra* note 2, at 21–42 (noting that “the shortcomings of the private market can occur in any of three areas – the choice of goods and services produced, production processes, and the distribution of outputs” and that government may encounter difficulties in correcting each problem, but explaining the role of nonprofits mainly as a response to the under-satisfied demand of supra-majority voters); *Id.* at 25 (“The rationale for the nonprofit sector, then, has two components: nonprofits are useful in providing collective goods when consumer demand is heterogeneous.”). See also James Douglas, *Political Theories of Nonprofit Organizations*, in THE NONPROFIT SECTOR 43, 46 (Walter W. Powell, ed. 1987) (outlining a similar supra-majority rationale for the philanthropic sector).

“failures,” each of which in turn calls for “solutions” in other sectors, or, seen more positively, requires the functions of other sectors.

It is helpful to see these various functions of government in tiers of increasingly “big” government. Starting with the most limited and basic, we can identify four levels of government function: (1) establishing the minimum legal conditions for market capitalism; (2) regulating the market to ensure its efficient operation; (3) redistributing wealth; and (4) promoting excellence. These four functions, we shall see, are cumulative: the second includes the first, even as the third includes both the second and the first, and the fourth, all the other three. We can, accordingly, think not only of functions of government, but also of forms. As a mnemonic, think of these forms or functions of government as the four Rs: the Ricardian,<sup>44</sup> the regulatory, the redistributive,<sup>45</sup> and the aretist.<sup>46</sup>

The common bases of all four governmental functions are these two essential attributes of the modern state: it is nonprofit, and it is nonvoluntary.<sup>47</sup> Because the state is nonprofit, it can, and does, undertake various operations without regard to whether they will produce the highest net return on investment. Because it is nonvoluntary, the state can make rules that all its citizens must obey.<sup>48</sup> There are no exceptions to the state’s laws (except as provided in those laws). Charles II may deign to doff his hat to Friend Penn, reversing the usual protocol, but both knew the king had waived a rule he might have enforced. No person, and no group, can be a “law unto itself;” a “state within a state” is, by definition, another state. Only a state is, as a matter of law, legally autonomous;<sup>49</sup> for all their differences, this was doubtlessly a point on which the Branch Davidians and the Department of Justice, like the Confederates and the Unionists before them, completely agreed.

The unique autonomy of the state has two important corollaries: to ensure that its will be done, the modern state has a monopoly over the use of force in its territory; conversely, no entity without that monopoly is, by definition, a state. All states command, then, and all states coerce; no other entity in modern society may do either, without the state’s consent. And the purpose of

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<sup>44</sup> See DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* (Everyman ed. 1911). This may not be entirely fair to Ricardo, but his admirers have surely done his reputation much more harm than this eponym will. See F. W. Kolthammer, *Introduction to THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION*, *Id.* at xi (“[T]hat Ricardo himself as a single person should have attributed to him the whole and sole responsibility of words and works of which his period, his experience, his followers, prejudiced or blind or both, must bear the burden, is an injustice compact of harshness and ignorance.”); *Id.* at xiii (“If it be, mediately or immediately, Ricardo’s shame to have justified many forms of misery, it is no less Ricardo’s glory to have suggested many paths of escape.”).

<sup>45</sup> “Robin Hoodian” would work nicely here, but, again, as with Richard Epstein and Robert Nozick, the R alliteration would be a bit of a stretch. And it might strike some as tendentious; we need to remember that Robin Hood is not everyone’s favorite folk hero. See AYN RAND, *ATLAS SHRUGGED* 577 (1957). According to Ragnar Danneskjold, Rand’s reverse Robin Hood, “Until men learn that of all human symbols, Robin Hood is the most immoral and the most contemptible, there can be no justice on earth and no way for mankind to survive.” *Id.*

<sup>46</sup> This one is the trickiest. Aretist is exactly the right term, but not, alas, a term in wide use outside philosophical circles. It derives from the classical Greek word for virtue, “arête,” and that is precisely what this function is designed to promote. “Aristotelian,” though much more familiar, is not nearly as precise; Aristotle was certainly an aretist, but many aretists are not Aristotelians.

<sup>47</sup> See, WEISBROD, *supra* note 2, at 41 (“Its [government’s] strength lies in its power of compulsion – to regulate and to tax.”).

<sup>48</sup> To say this is not to embrace the crudely positivist position that laws are only commands of the state.

<sup>49</sup> See Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585 (1998) (distinguishing between the charity role as complementing, as opposed to competing with, the state).

states' commanding and coercing is not always, or even primarily, to maximize return on investment; the governmental sector has four distinct functions of its own.

That is not to say – thankfully! – that all states are created equal. The particular state on which we are focusing here, the United States, is both liberal and democratic, a balance between protecting individual interests and advancing majority interests. At the behest of the majority, such states both command and coerce, but always subject to legal limits designed to protect the liberties of individuals and minorities. Commanding and coercing, then, are the prerogatives of all states; majority rule and individual rights are the particular parameters of the liberal democratic state.

Before turning to the details of our analysis, we should recall, again, Aristotle's warning: We can only be as precise as our subject allows.<sup>50</sup> Conversely, we need only be as detailed as our object requires: We seek not a full theory of the state, or even the liberal democratic state, but only enough of an outline of the latter to show how it relates to the function of philanthropy. In faulting the "government failure theory" of philanthropy for being too crude, this analysis must not err in the other direction. With another nod to Aristotle,<sup>51</sup> we must try to find the mean between too much detail and too little.

### 1. *THE FOUR FUNCTIONS OF GOVERNMENT.*

We will consider the functions of the liberal democratic state in increasing order of scope, from the minimalist – Ricardian night-watchman function on the right – through the Regulatory function in the middle, to the maximalist – Redistributivist and Aretist functions on the left. Each of these functions, in its turn, implies a metric for measuring performance. Coordinating these functions and making their metrics commensurate poses serious, if not insurmountable, problems for liberal democracy.<sup>52</sup>

#### *a. The State's Market-Supplementing Functions.*

The state's four basic functions, for our purposes, fall into two groups: (1) market-supplementing functions, which involve making the market work better by its own metric, economic efficiency; and (2) market-supplanting functions, which involve altering the outcomes of even an optimally functioning market. We begin with the state's two market-supplementing functions, the Ricardian and the Regulatory.

#### *(1) The Ricardian Function: Securing the Foundations of Markets.*

As we saw in the last section, the very existence of market capitalism necessarily implies one basic governmental function: recognizing and protecting private interests in property. Law, particularly property law, is the foundation of market capitalism that the for-profit sector can neither establish nor sustain beneath itself. If we are to have market capitalism, then, we must have at least this kind of minimalist, night-watchman state.

This function implies two basic and complementary metrics, one to measure how much government must do, and the other to measure how well government is doing it. The first measure is a minimum: if a society wants a capitalist market economy, its government must

<sup>50</sup> ARISTOTLE, *POLITICS* 190 (Benjamin Jowett trans., Modern Library ed., 1943); ARISTOTLE, *NICOMACHEAN ETHICS* 4 (Martin Ostwald trans., 1962).

<sup>51</sup> ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 50, at 43–44 (defining virtue as a rational mean between excess and deficiency, relative to human beings).

<sup>52</sup> See Douglas, *supra* note 43, at 215 (concluding that "the economic good, for all its ultimately unquantifiable aspects, remains a much tidier concept than the political good" because "there is no similar single measure that can be applied to political institutions"); MUSGRAVE & MUSGRAVE, *supra* note 6, at 17 ("Although fully coordinated policy determination permits simultaneous achievement of the various objectives, actual practice gives rise to multiple conflicts."); *Id.* at 18–20 (identifying conflicts of each function with the others).

provide no less legal infrastructure than the operation of a capitalist market requires. Put that way, this is admittedly a most peculiar metric; it seems almost tautologically obvious, and it would be practically impossible to specify with any precision. But that metric, precisely because of its peculiarity, underscores a point of absolutely critical importance for our inquiry: in very few cases is the provision of a particular good or service the special province of a single social sector. To the contrary: sectoral functions are, excepting at a very small core, largely fungible. Only the state, we have seen, can establish a regime of legal entitlements to resources. When it comes to enforcing that system, however, the state can be more or less expansive; the state can rely to a greater or lesser extent on other sectors.

For a capitalist market to exist at all, theft must be illegal; to keep your shop safe from theft, the state can put a police patrol on your block. Alternatively, you can look to other sectors for protection: you and your family can guard your store with stick-and-stone implements of your own construction, a household sector solution;<sup>53</sup> you can invest in locks, guns, and security guards, a for-profit sector solution; you and your neighbors can form a neighborhood watch, a philanthropic sector solution. Again, our four sectors overlap extensively in the provision of goods and services.

More to the present point, the night-watchman state can be very stingy in providing actual night-watchmen. Laws on the books without police on the beat would not be entirely a sham; the Ricardian state needs little more than laws on the books to define entitlements, courts on the bench to apply the laws to particular cases, and (maybe) law enforcement waiting in the wings to execute court orders (and an army at the border to prevent invasions).<sup>54</sup> Prevention of harm to property, criminal as well as tortious, could be left, at least in theory, in private hands; in our store example, your family's hands, or those of your hired agents, or of you and your neighbors. (So too, perhaps, with the enforcement of court orders; once you have your writ, you could hire your own agent, licensed but not employed by the state, to enforce it; if this seems far-fetched, think of it as a kind of post-hoc combination of process-servers and bounty hunters.)

The measure of the state's Ricardian function – how much infrastructure the state should supply – is thus a peculiar minimum: provide at least as much legal infrastructure as capitalism requires, but not more. The second metric – how well the state is providing legal infrastructure – takes us back to our familiar, virtually universal criterion of productive efficiency: the state, like everyone else, should get as much “bang” for its buck as possible, in market-infrastructure as in all other outputs. That, of course, raises an important practical and theoretical question: How are we to know if the state is, in fact, getting the most “bang” for its “buck”? One obvious way

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<sup>53</sup> Notice, significantly, that this leaves us a long way from anarchism. For our private-sector crime-prevention mechanisms to work, the state's judges must be waiting at the courthouse, even if its police are not patrolling the precinct. If, for example, our shopkeepers decide to hire night-watchmen of their own, that arrangement will only work if the state stands ready to enforce the contract in a lawsuit for its breach. Similarly, if another shopkeeper decides to rely for protection on guns and locks, he or she will also rely on the state to award damages or other legal relief if those items do not perform as promised. The night-watchman state, in other words, may be able to rely on for-profit methods to prevent the theft of property, but that market method itself will require state remedies for breach of contract.

<sup>54</sup> To quote the prophet's prophet, Ayn Rand's fictional hero John Galt: “A proper government is only a policeman, acting as an agent of man's self-defense . . . . The only proper functions of a government are: the police, to protect you from criminals; the army, to protect you from foreign invaders; and the courts, to protect your property and contracts from breach or fraud by others, to settle disputes by rational rules, according to *objective* law.” RAND, *supra* note 45, at 1062–63 (1957) (speech of John Galt) (original emphasis).

would be to compare the performance of other states; here Brandeis's "laboratory of experiment" theory of federalism comes to mind.

More important for our purposes, however, is a very different comparison: provision by other social sectors. We have seen that only the state can, by command and coercion, establish a property regime; we have also seen that other sectors can, with the state's blessing, provide basic property protection. What we need to see here is that the state is not limited to "authorizing" or "licensing" agents in these other sectors to protect property; it can also pay them to do it. All things being equal, the state, under the metric of productive efficiency, should not put a policeman on your block if putting a lock on your door (or, yes, a gun under your counter) would accomplish the same amount of protection at lower cost. Notice, finally, that it does not matter, at this point in our analysis, whether the state pays for the lock (or gun) or requires you to buy it yourself; what matters, under the metric of productive efficiency, is that the state chooses the most cost-effective method. Remember the "Massachusetts plan" for universal health coverage did not offer state provision of insurance, but rather mandated the private purchase of insurance.

(2) *The Regulatory Function: Correcting Classic Market Failures.*

The first, "Ricardian" function of the state, in a society with a market economy, then, is to supply at least the minimum infrastructure of property law and enforcement. An appealing next step is to attempt to correct classic market failures. This step is actually taken by all modern liberal democratic governments, including our own. Market failures undermine economic efficiency, the very getting of goods and services to those willing and able to buy them that is the basic mandate and metric of the market. These failures come in two basic forms, information asymmetries and externalities, and the state has a wide array of corrective means at its disposal for correcting both.

Any measure the state takes to improve the efficiency of the market is, analytically speaking, beyond the pale of the minimalist, Ricardian state. So, as we saw in our example, if the market can function with shopkeepers hiring their own night watchmen, then the night-watchman state should not, by its own minimalist metric, be in the business of crime-prevention. This point is important because we need to see that the night-watchman state's role is to produce minimal, not optimal, conditions for market capitalism. That critical distinction is the line between the Ricardian and the Regulatory state.<sup>55</sup>

In deciding whether the state should more actively intervene in the market, beyond merely establishing property entitlements and monitoring their exchange, we have to ask a very different question: Would the efficiency gains from the intervention exceed the costs of that intervention? More precisely, would gains in efficiency attributable to the state's corrective measure exceed the sum of the costs of that measure, including transaction costs? Consider, again, the situation of our shopkeepers. Should the state place police on the beat, to supplement or supplant private vigilance? This is, notice, merely a special application of the market's own metric: any resource allocation, whatever the means of that allocation, is appropriate if and only if its effect is to increase net efficiency, that is, to get more goods and services into the hands of

<sup>55</sup> This is a distinction with a much bigger difference than the one on which this analysis focuses. The minimalist, Ricardian state was the ideal of Allen Greenspan during his entire tenure as chair of the Federal Reserve Board. At his installment, the guest of honor was none other than Ayn Rand herself. Bill Goldstein, *Greenspan Shrugged: When Greed was a Virtue and Regulation the Enemy*, N.Y. TIMES, Jul. 21, 2002, at C7. In fairness to Mr. Greenspan, we should note that he has, since leaving the Board, publicly repudiated his Ricardian – more precisely, Randian – position on the government's regulatory role. Edmund L. Andrews, *Greenspan Concedes Flaws in Deregulatory Approach* B1, N.Y. TIMES (Oct. 24, 2008).

those willing and able to pay for them. By this standard, the state should supply police if and only if it can thus achieve a higher level of property protection than by other means, at equal or lower costs.

Why might the state's intervention out-perform the market in protecting our shopkeepers? Police protection involves external benefits. A security guard posted outside a store tends to deter crime several doors down almost as well. Thus, if you and I pay to put guards outside our places of business, we are conferring an external benefit on Jones' shop down on the corner. The problem is free-riding: If I expect my neighboring shopkeeper to supply guards that will also deter crime at my door, I have no incentive to provide guards myself; if everyone assumes that someone else will supply guards, there is a risk that no one will. Government's regulatory role addresses precisely this problem of the for-profit sector (and, as we shall see, its household and philanthropic sector corollaries). With its command-and-coerce power, the state can make Jones pay for public goods like police protection at a level well beyond the limits of his neighborly inclinations.<sup>56</sup>

And, of course, the state does not tax and spend only for police protection. That example nicely illustrates the line between the minimalist Ricardian state and the more ambitious regulatory state, but it nowhere near exhausts either the range of market failures that the regulatory state may address or the means of redress at its disposal. The failures, as we have seen, are basically of two kinds, information asymmetries and externalities; the state's means of redress run along a kind of sub-spectrum within our larger spectrum of government functions. Just as some government functions are more extensive than others, so, too, some modes of regulation are more intrusive or coercive.<sup>57</sup> To see how this is so, consider the product Jones sells down at his corner shop: alcoholic beverages.

Notice, first, that this particular product involves information asymmetries. Many people apparently did not know, until fairly recently, that alcohol consumption is exceedingly bad for the human fetus. As a result, some pregnant women surely consumed more alcohol than they would have, had they known the dangers. Pregnant women might well be willing and able to pay for this valuable information, but they may not know to look for it in the first place. Getting the message out to the public at-large involves huge external benefits. So large, in fact, as to make this information essentially a public good, which no private company can profitably supply.

The government, on the other hand, does not face this problem, because it does not depend on sales of the information to finance its public education campaign. It can spend part of its tax revenues on a public ad campaign. The proper level of government spending, under the criterion of economic efficiency, will depend on how much those getting the information would be willing and able to pay for it; whether to do the campaign in-house or contract it out would depend, under the criterion of productive efficiency, on whether the government or suppliers from another sector could do the job more cheaply. With respect to the effects of alcohol on fetuses, the government does indeed have an ad campaign, and it has in fact contracted most of the actual advertising out to private companies. This is government at very nearly its least

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<sup>56</sup> See Douglas, *supra* note 43, at 45 ("Only the state, by using the coercive power of law, can avoid free riders, and thus hopes it will achieve a distribution of resources that more closely approximates the collective interests of the community."); *Id.* at 46 ("[T]he principal advantage enjoyed by public services run by the government agencies and financed by compulsory taxation is that the scale of the service and the resources devoted to it are not limited by the free-rider problem.").

<sup>57</sup> This outline follows Robert Ellickson, *Spectrum of Land Use Controls*, 40 U. CHI. L. REV. 681 (1973). See also WEISBROD, *supra* note 2, at 20–23 (outlining range of government's market-correcting options).



intrusive market-correcting mode: just providing information, albeit at the public's expense, and letting consumers make up their own minds.

A bit more coercively, the government can and does command the producers of alcoholic beverages to disclose the harms of alcohol on the labels of their products. Every retail container of alcoholic beverage now carries just such a warning, as a matter of federal law. This is more coercive than the government's own advertising campaign in two ways. First, and most obviously, the law compels the producers to carry the warning on their labels; no one has to pay attention to the government's own educational campaign. Second, the cost of the labeling falls, at least initially, on the producers, not, as with the ad campaign, upon the entire tax-paying public. If the public does not want to underwrite the campaign, they can remove it by majoritarian means. The alcohol producers have no such option; they are, almost by definition, a political minority.

And, of course, the government's hand can get heavier still. A classic regulatory response is the Pigouvan tax: a tax on the externality-producing product, set at a level designed to equal the external cost of that product on society at large.<sup>58</sup> The effect, in theory, is to bring consumption down to the efficient level by having the product's price reflect its true economic cost. This obviously would not work particularly well with the fetal alcohol problem, which is more a matter of information asymmetry than external costs. But over-consumption of alcohol, of course, is bad for everyone, not just fetuses. And the effects of over-consumption are not all borne by excessive drinkers themselves. The chronic health problems of alcoholics cost us all, one way or another: higher health insurance rates, increased Medicare and Medicaid costs, lost productivity, loved ones damaged or dead. Drinking too much alcohol has terrible cumulative health effects; drinking even small amounts of contaminated alcohol can kill or maim immediately. The patent drug and liquor surrogate Jamaican Ginger, or "Jake," admixed with the plasticizer TOCP, caused an epidemic of paralysis and death in the 1930s, the notorious "Jake-Leg";<sup>59</sup> moonshine condensed through car radiators and other lead-soldered coils is a notorious source of lead poisoning even now. The Ricardian state lets buyers beware, with legal remedies for tort and breach of contract if their judgment fails; the regulatory state strikes preemptively with the likes of the Food and Drug Administration. This is classic "command and control" intervention, what we might call regulation proper.<sup>60</sup> Relative to the other methods we have discussed, regulation can be quite intrusive. It can mandate, for any product it regulates, both input procedures and output standards, which in turn may require an extensive enforcement apparatus.

And, as the Prohibition experiment reminds us, the state can be even more intrusive; it can, and does, ban production of some goods and services<sup>61</sup> altogether. Even more aggressively, in some respects, the state itself can take over production and marketing of a product. An early and long-lived alternative to Prohibition was state monopoly on the sale of alcoholic beverages. For producers not under contract to supply the state, this has the same effect as Prohibition; for

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<sup>58</sup> See A. C. PIGOU, *A STUDY IN PUBLIC FINANCE* (1928). See also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007).

<sup>59</sup> See, e.g., Dan Baum, *Annals of Epidemiology: Jake Leg*, *NEW YORKER*, Sept. 15, 2003, at 50.

<sup>60</sup> See Ellickson, *supra* note 57.

<sup>61</sup> Prostitution, for example, with limited exceptions like Nevada.

the state itself, this involves actually taking on functions otherwise performed by for-profit firms, a kind of “retail” socialism, socialism in a single industry.<sup>62</sup>

The regulatory state’s means of correcting market failures thus covers a wide spectrum, running from minimal market intervention like public information campaigns to the state’s complete displacement of for-profit firms in a particular industry. The state may merely inform. Beyond that, it can compel producers to make disclosures, levy Pigouvan taxes to approximate true costs, and impose “command and control” regulations on production. It can even ban production altogether or, most ambitiously, take over production itself. In deciding which method to deploy, however, the regulatory state’s basic function implies that it should deploy a single metric, borrowed from the market itself: maximizing efficiency. As applied to regulation, that means spend as only as much on regulation as produces a net return in social wealth, the production of goods and services consumers are willing and able to buy.

As Jones, our liquor-vending neighbor, would be the first to point out, taxing and spending presents its own set of problems. We will take those up in due course. For the most part, they involve some sort of governmental malfunction or “failure.” But one problem is important to consider now because it leads us nicely to the next function of government – redistribution. Even if government regulation is working at its best, ensuring efficient production and consumption and thus maximizing social wealth, there is an almost inevitable element of what might be called unfairness. The regulatory state, with its wealth-maximizing metric, is indifferent about who bears the burden, or enjoys the benefits, of its market-enhancing function. That function is maximum wealth production, not equitable wealth distribution.

To see why this presents problems, consider, again, the position of Mr. Jones, the proprietor of our local liquor store, who objected to paying higher taxes for more police officers. Our earlier analysis implied, perhaps unfairly, that Jones was some sort of libertarian misanthrope. We were at pains, at that point in our analysis, to distinguish the minimalist Ricardian state from the more expansive regulatory state. As a fan of the former, Jones may well have disliked the additional police protection available from the latter. He might, in other words, have been criticizing the policy from the right, as an expansion of the state beyond its minimal night watchman role.

On closer inspection, we might find that his objection comes, not from the far right of the regulatory state, but from the center-left. If we asked Jones why he opposed our plan for more police, he might respond with two questions of his own: What else might the state be doing with that money, and where does that money come from in the first place? It comes, of course, not from the tax payments of our little retail street, but from the city’s general revenues. Compared with us, some of our tax-paying fellow citizens are doubtlessly better off, some worse. But the city’s tax burden falls on all, probably without much regard for relative ability to pay (it may be based on the value of the real property a citizen owns, but that is a pretty crude proxy for net wealth, itself, perhaps, not an ideal base for ability to pay).

It is important to note that this indifference is not an artifact of any particular tax system, but a basic element of the efficiency metric itself. To be more precise, that metric is Kaldor-Hicks efficiency, not Pareto optimality.<sup>63</sup> Pareto optimality requires that a measure make everyone better off; the less demanding Kaldor-Hicks standard only requires that those who benefit from a measure gain more than those who bear the costs lose. In other words, Kaldor-

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<sup>62</sup> By contrast, “wholesale socialism” would be the displacement of private by state production in all industries; this is what we generally mean, of course, by socialism.

<sup>63</sup> See POSNER, *supra* note 58.

Hicks efficiency requires that the winners be able to compensate, with their winnings, the losers' losses. But it does not require actual compensation, and it is indifferent as to whether the losers were less well off than winners before as well as after the transaction.

Some of our fellow citizens, we might point out to Jones, may pay no taxes at all, but that would most likely not be responsive to his objection. From his perspective, their tax exemption is not the conferring of a privilege, but the recognition of a harsh reality: they are poor. And that brings us to his other question, what our city's tax revenues might be buying as an alternative to more police on our commercial block. Here is the core of his problem, which takes us back to a basic peculiarity of the market and its metric: The needs of the poor do not get counted; demand requires, by definition, ability as well as willingness to pay. It may be economically efficient to put another police patrol in our neighborhood, but that money might also have been spent on education, even bread, for our less fortunate fellow citizens in their less affluent neighborhoods. Putting more police on our street may literally mean taking a loaf of bread off the poor's table or closing their neighborhood school. To deal with the market's indifference to inability to pay, we must turn to another of the state's functions, wealth redistribution.

*b. The State's Market-Supplanting Functions.*

The state's first two functions, we have just seen, are market-supporting; in performing those functions, the state helps the market itself function better by its own metric, economic efficiency. In questioning either aspect of that metric, consumer willingness or ability to pay, we approach the state's market-supplanting functions, the redistributive and the aretist.

*(1) The Redistributive Function: Addressing the Market's Indifference to Wealth Distribution.*

Virtually all government activity is redistributive, in the sense that it involves benefiting some at the expense of others. As we have just seen, this is true even of the state's Ricardian and regulatory functions. There, however, the redistribution is incidental; the purpose of the government action is to accomplish other tasks: establishing the conditions of the market economy and enhancing the market's own function, efficient allocation of resources. In that context, the metric of economic efficiency is indifferent as to whether, as a result of the government's action, those who benefit were the richer or the poorer.

Here we take up a more basic feature of the efficiency metric, its more general indifference to the distribution, as opposed to the aggregate amount, of social wealth.<sup>64</sup> As we have seen, the poverty of the poor is simply invisible to economic analysis; if you cannot pay for goods or services, you have, as a matter of definition, no demand for them. The government's redistributionist function addresses that anomaly; it involves the transfer of wealth either as an end in itself or a means to some end other than establishing markets and making them more efficient. This "redistribution proper" is thus distinguishable from the redistribution that is incidental to merely (1) make markets possible and (2) correct market failures.<sup>65</sup>

In a very simple case, the state might undertake to ensure that every citizen has at least a minimal income, enough, that is, to purchase the basic necessities of life: food, shelter, and

<sup>64</sup> See MUSGRAVE & MUSGRAVE, *supra* note 6, at 12 ("Modern economic analysis has steered shy of this problem," i.e., "what constitutes a fair or just state of distribution"). *Id.* at 89 ("Economists . . . have increasingly held that a theory of just or equitable distribution is not within the purview of economics but should be left to philosophers, poets, and politicians."). *Id.* at 91 ("Standard economic analysis . . . does not tell us what state of distribution should be our goal, i.e., what the criteria for distributional justice and fairness should be").

<sup>65</sup> *Id.* at 102 ("Such voluntary redistribution may be analyzed with the same tools used to determine efficiency in allocative economics," although this takes the pre-redistribution state of relative wealth as given.).

clothing. This is, of course, the function Robin Hood famously performed, with this important difference: When the state takes from the rich and transfers to the poor, the taking is, by definition, not highway robbery, but a legitimate function of government.

It is important to note that wealth redistribution is not necessarily leftist, much less revolutionary; Robin Hood, remember, was himself a monarchist, even a legitimist. Although the redistributionist state lies, as a conceptual matter, to the left of the Regulatory State, it is, as an historical matter, quite centrist. Richard Nixon, no Robin Hood re-incarnate, famously favored a negative income tax. For those earning below a certain threshold, the government would not take money from them, in the form of the familiar income tax, which is “positive” from the state’s perspective; instead, the state would pay money to the under-earners themselves, a “negative” tax from, again, the state’s perspective.<sup>66</sup> The intended effect was to put some of wealthier people’s money into poorer people’s hand; at the time, this was a mainstream Republican approach to poverty relief – or, more likely, welfare reform.

On the example of Nixon’s negative income tax, then, it is fair to say that redistribution does not begin on the left; still and all, as Nixon well knew, redistribution can run a very long way in that direction. The redistributive state can be quite aggressive; it can undertake anything from Nixon’s own modest, if not minimalist, plan to Lyndon Johnson’s full-blown war on poverty, and beyond. The parameters of our liberal democratic polity and capitalist market economy permit a wide range of redistributive goals: prevention of misery, provision of opportunity, equalization of wealth, promotion of productivity, encouragement of excellence.<sup>67</sup> Each of these would, predictably, imply its own metric, with its own optimal and minimal level of redistribution. As we shall see, choosing among these competing redistributive goals poses a serious problem for liberal democracy.<sup>68</sup> As Aristotle observed:

All men think justice to be a sort of equality . . . But there still remains a question: equality or inequality of what?<sup>69</sup>

Here we need to notice another problem, which leads to the state’s fourth and final function. Nixon’s objection to the Great Society was not just the size of its redistribution, but also its method. The Great Society involved not just larger wealth transfers than Nixon’s negative income tax but also transfers of a very different kind. Many Great Society transfers were in kind rather than in cash. Thus, the Great Society did not give the poor money to spend on bread; it gave them food stamps, which they could spend on nothing else. Notice, again, that this is not merely a preference of the left. At the other end of the political spectrum, advocates of educational vouchers are not calling for distributions of cash.<sup>70</sup> Thus, on the political right as well as left, there is something more than merely the amount of redistribution at issue; government, as these examples indicate, does not merely redistribute wealth, it also decides how that wealth is to be spent. That is the state’s fourth, aretist, function; depending on one’s

<sup>66</sup> *Id.* at 724 (defining negative income tax); see generally C. GREEN, *NEGATIVE INCOME TAXES AND THE POVERTY PROBLEM* (1967).

<sup>67</sup> See Miranda Fleischer, *Theorizing the Charitable Sector: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505 (2009) (outlining various redistributive goals); MUSGRAVE & MUSGRAVE, *supra* note 6, at 12, 92–97 (describing various redistributive goals).

<sup>68</sup> MUSGRAVE & MUSGRAVE, *supra* note 6, at 12, 97 (noting difficulty of making principled choices and practical balances among various redistributive goals).

<sup>69</sup> ARISTOTLE, *POLITICS*, *supra* note 50, at 149.

<sup>70</sup> That said, it must also be said that this may be a matter more of political expediency than principled preference; in all likelihood, at least some opponents of public schools also oppose mandatory education. See *infra*, Part IV.B.

perspective, it is either “promoting the general welfare” or paternalism, imposing the preferences of some on others, generally at the expense of still others.<sup>71</sup>

(2) *The Aretist Function: Addressing the Market’s Indifference to the “Goodness” of Goods.*

The market’s provision of goods and services involves two basic criteria of consumer preference: ability to pay and willingness to pay. Government’s redistributive function addresses perceived problems with the “ability to pay” criterion, most basically, that the penniless have no demand for bread. The government’s aretist function addresses perceived problems with the market’s other criterion: consumer willingness to pay.

The second problem is basically this: Given the ability to pay, some people may buy what others believe are the wrong goods and services.<sup>72</sup> That is, of course, the deeper message of the homeless person’s hand-lettered sign: “Will Work for Food.” The bearers of that sign deeply suspect of us our deep suspicion of them: if we give them our money, they will buy, not food or shelter or clothing, but alcohol, tobacco, or other drugs.<sup>73</sup> This suspicion lies at the foundation of the aretist state. The redistributive state simply makes some people richer; they can do with their new wealth whatever they want. The aretist state means to make them better, by a standard other than their own preferences.<sup>74</sup>

The redistributive state, we might say, reflects our fraternal instincts; it makes us our brother’s keeper, at least in the sense that it responds, more or less generously, to the Depression-era request: “Brother, can you spare a dime?”<sup>75</sup> The aretist state goes a critical step further; it imposes at least some measure of supervision.<sup>76</sup> To be sure, it gives its wards an allowance, but it also insists on a say in how they spend it. Thus the aretist state is, functionally speaking, not “Big Brother” but a surrogate father who presumes to know better, if not best. Minimally, the aretist state protects us from ourselves; ideally, it makes us better people. It always operates on the premise “this is for your own good.” Paternalism, of course, is not a word with entirely positive connotations; the aretist state is what Margaret Thatcher derided as “the Nanny State.”

This role of the state as super-ego need not be as insidious as it sounds. Here again, as with the redistributive function, the state can operate anywhere along a very wide spectrum. All but the most aggressively Ricardian state must be at least minimally paternalistic; only in some sort of Szaszian<sup>77</sup> sub-minimalist state would a declaration of insanity lie outside the proper

<sup>71</sup> See MUSGRAVE & MUSGRAVE, *supra* note 6, at 85 (“The existence of merit goods . . . may be taken to suggest that our society, which considers itself democratic, retains elements of autocracy which permit the elite (however defined) to impose their preferences”; alternatively, “it may be interpreted as adherence to community interests or values by which individual choices are overridden.”).

<sup>72</sup> *Id.* at 84 (“[A] realistic view of the fiscal scene cannot avoid noticing many instances where policy seems to aim at interfering with rather than responding to individual preferences.”).

<sup>73</sup> *Id.* at 85 (noting that provision of goods to the poor in kind may reflect a majority view that the poor would spend additional income on “frivolous” things.); *Id.* at 321 (noting that “voluntary giving is made more acceptable to the donor if the recipient must use the funds in line with the donor’s own preferences”).

<sup>74</sup> *Id.* at 85 (“If the purpose of such aid [as in-kind services to the poor] were merely redistributive, it could be better met by cash grants, leaving it to the recipient to decide how to spend the money. By making the grant in kind, the government imposes its own preferences.”).

<sup>75</sup> See MUSGRAVE & MUSGRAVE, *supra* note 6, at 102–03 (“A’s preferences may be such that A derives utility from B’s consumption independent of what products B consumes.”).

<sup>76</sup> *Id.* at 103 (“A may derive more satisfaction from B’s consumption of milk than of beer; A’s giving will then take a paternalistic form and the transfer will be made in kind.”).

<sup>77</sup> Both can also try to change their preferences, making them willing to buy more, or less, at existing prices. But the market does this to increase profits; the state, for other ends.

scope of state power.<sup>78</sup> Deeply imbedded in the common law of property itself, as a matter of both historical fact and necessary principle, is the notion of competence. The legally incompetent cannot form contracts, transfer property, or direct agents. So, too, the market's basic price mechanism involves a willing buyer and a willing seller, each of whom is, implicitly, sane, at least in the sense of being capable of rationally assessing the opportunity costs of any given transaction. To function in a market economy, one needn't have a Harvard MBA, but one has to be able to tell a hawk from a handsaw.<sup>79</sup>

In performing the aretist function, all liberal democracies, including our own, demand much more than just minimal competence. Both food stamps and school vouchers impose consumption restrictions on fully competent adults. But these examples, it is important to see, are only the most obvious, and basic, of aretist measures, the thinnest end of the aretist wedge between our wealth and what we are allowed to do with it.

The means at the disposal of the aretist state are essentially the same that we saw earlier with respect to the regulatory state; they run from educating people about alternative choices through making those alternatives more or less expensive, up to the point of legal sanctions, through government provision of preferred products. The distinction between the regulatory state and the aretist state is not the means, but the end. The regulatory state seeks to maximize consumer satisfaction by correcting market failures; the aretist state seeks to produce a mix of production and consumption somehow superior to that of even a perfectly functioning, fully efficient market.<sup>80</sup> The state's regulatory function is to ensure proper prices, to include benefits and costs otherwise external, and avert exploitation of information asymmetries. The function of the aretist state is to lower or raise costs "artificially," thus making consumers buy more or less of certain products than they would if left to their own devices. The regulatory state seeks to give people goods they want at the price they are willing and able to pay. The aretist state seeks to give people what they should have – the goods and services that make them better.<sup>81</sup>

Consider, again, the case of alcoholic beverages.<sup>82</sup> Their production and consumption may include costs or benefits not reflected in the market price; the regulatory state seeks to correct that price or, failing that, to produce the optimal market outcome by other, more market-intrusive, means. The aretist state, by contrast, may see recreational consumption of any alcohol as a vice, as such, even as it may see sacramental consumption of some alcohol as a virtue. Precisely that seems to have been the perspective embodied in the Prohibition Amendment: produce and consume no alcohol (except for sacramental purposes).

*c. Common Features of the State's Market-Supplanting Functions.*

If the aretist state, like the regulatory state, is long on means to its ends, it is also long, like the redistributive state, on possible ends themselves. For both the redistributive and the

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<sup>78</sup> See MUSGRAVE & MUSGRAVE, *supra* note 6, at 84–85 (distinguishing regulation of externalities from promotion of "merit goods" and discouragement of "demerit goods").

<sup>79</sup> *Id.* at 85 (distinguishing "temporary interference," in which "consumers may be exposed to an educational process which will permit more intelligent later on" and "intervention . . . directed at children or the mentally disabled," as involving "a protective or remedial rather than interventionist spirit," where "the government imposes its own preferences").

<sup>80</sup> Both can also try to change their preferences, making them willing to buy more, or less, at existing prices. But the market does this to increase profits; the state, for other ends.

<sup>81</sup> See MUSGRAVE & MUSGRAVE, *supra* note 6, at 84–85 (distinguishing regulation of externalities from promotion of "merit goods" and discouragement of "demerit goods").

<sup>82</sup> *Id.* at 320 (noting that "the rationale for heavy taxation of liquor and tobacco" is "presumably" to "correct consumer preferences" by imposing "selective excises" on "demerit goods").

aretist state, this wide range of possible ends is very much an embarrassment of riches. As the redistributive state, in seeking to enable people to buy more of what they actually want, raises the question of “how much more,” so the aretist state, in seeking to encourage people to consume something other than what they actually want, raises the question “what else?”

With the state’s aretist function, as with its redistributive function, the answer will depend on the end, and neither the redistributive nor the aretist function, in contrast to both the regulatory and Ricardian functions, implies a single end with its own metric. The redistributive state that seeks equality of opportunity will foster a different measure of redistribution from the redistributive state that favors equality of outcome. So, too, the aretist state that favors connoisseurship of fine wine will have a very different policy toward viticulture from the aretist state that favors total abstention from alcohol. Compare, in this regard, the wine policy of France, with those of the Kingdom of Saudi Arabia, the Islamic Republic of Iran, and the “dry” counties of Alabama and Kentucky.

At this point it is useful to notice that these two functions, redistribution and aretism, are fundamentally related. Every decision to redistribute wealth involves an implicit decision that some distribution is more desirable than what the market would otherwise provide; every aretist plan involves a measure of redistribution in favor of some allocation of resources other than what the market would produce. In other words, every aretist plan involves a decision to do some measure of redistribution; every redistributionist plan involves a choice of recipients who are in some identifiable sense “better” or more deserving than those who would benefit under purely market-based metrics. Both functions, the redistributivist and the aretist, aim to produce better outcomes than the market; aretist aims to produce, beyond that, better outcomes than individual people on their own. Thus all aretism is redistributive, and all redistribution is aretist, at least toward the market; some redistribution is also aretist with regard to the preferences of individual consumers.

The fact that aretism is parasitic on redistribution permits us to derive a useful metric of both aretism and redistribution from a more general dependence of the governmental sector itself upon the for-profit sector. To the extent that the state takes the wealth that it redistributes from the for-profit sector, the state should operate under a rational redistributive ceiling. This ceiling involves little more than a refinement of folk wisdom: “Don’t kill the goose that lays the golden egg.”<sup>83</sup> Market capitalism is the state’s goose; the golden eggs are the goods and services it produces. From that store of wealth the state can draw the funding for its redistribution.<sup>84</sup> In drawing from that store, however, the state should exercise at least this much restraint: Do not extract so much of capitalism’s bounty as to deprive capitalists of all incentive to produce that bounty in the first place. Taking more than that maximum for redistribution today will leave nothing to take for redistribution tomorrow.

Significantly, this redistributive maximum is only a ceiling. The redistributive function gives no guidance for redistribution below the ceiling, nor does it imply any floor level of redistribution.<sup>85</sup> In terms of our barnyard proverb, this metric does not tell the redistributionist

<sup>83</sup> It can, as you would guess, be stated with much more mathematical rigor. See, e.g., Frank Michelman, *Property, Utility, and Fairness*, 80 HARV. L. REV. 1165, 1212–15 (1967).

<sup>84</sup> Revenues can come from any of the other three sectors, all subject to the same principle, though likely with different effects. Indeed, as we shall see *infra* Part III, justifying the exclusion of philanthropy from the base of the federal income tax is nothing if not a challenge.

<sup>85</sup> EPSTEIN, *supra* note 16, at 16; The Ricardian function provides a floor on government expenditure, but this need not involve redistribution; the state could, that is, make finance the capitalist infrastructure with some sort of user-fee on capitalists. Cf. EPSTEIN, *TAKINGS*, at 16 (“[T]he state will not obtain the resources needed to operate by

how many golden eggs to take from the capitalist geese or to whom to give the eggs, and it does not tell the artist what to require the eggs' recipients to buy.

For finding these measures, we would need to interpolate from the redistributive maximum an optimal level of redistribution, the level of the last *appropriate* dollar of redistribution, as opposed to the last *possible* dollar of redistribution.<sup>86</sup> Recalling our other metrics, productive efficiency and economic efficiency, we could call that more finely calibrated, marginal metric "redistributional efficiency."<sup>87</sup> We could doubtlessly give it a more abstract, algebraic form,<sup>88</sup> but its essence would be this: Redistribute wealth precisely to the point at which the good of the last dollar redistributed exactly offsets the good that that dollar would have done in the hands of its original holder.<sup>89</sup> So Robin Hood must have directed his merry men: take from the rich and give to the poor exactly to the point at which the poor are no longer made better off than the rich are made worse off.

Even with that admittedly informal statement, we can see serious problems with this standard as a measure of both pure and artist redistribution. With respect to both, we would need to interpolate another factor: the extent to which, at any given level of redistribution, the "haves" are discouraged from future production. This is, in effect, an interpolation of what we have already identified as the redistributive ceiling. At that level, as we saw, we have taken so many of its golden eggs that the capitalist goose simply stops laying them. Of course, that would be a cumulative effect. At each lower level of redistribution, there would predictably be a corresponding level of production lost on account of that particular redistribution. In weighing the gains to those who receive redistributions against the losses to those who pay for the redistribution, we would need to account for that "demoralization factor" as well.<sup>90</sup> This factor, to say the least, would be complex to calculate in practice, though by no means impossible in principle.<sup>91</sup>

The real problem comes in deciding what counts as a loss to those who pay and a gain to those who get paid, the "winners" and "losers" in redistribution. As to pure redistribution, we would need to know a much-discussed number, the marginal utility of money for a relatively poor person as compared to a relatively rich person,<sup>92</sup> essentially how much more satisfaction an additional dollar buys for one at what cost to the other. At the extremes, this phenomenon has obvious intuitive appeal: the dollar with which a starving child buys a crust of bread surely provides more satisfaction than the dollar a billionaire spends on seeds for pet parakeets or park

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voluntary donation or exchanges . . . [i]f these sources of revenue and power were sufficient, then the state would raise no problem that a system of ordinary markets could not solve.").

<sup>86</sup> See MUSGRAVE & MUSGRAVE, *supra* note 6, at 101 ("While society may well accept some efficiency loss to obtain an equity gain, distributional adjustments should be made so as to minimize this efficiency loss."); *Id.* at 315 ("To put it more generally, the problem may be viewed as one of designing a set of negative and positive income tax rates which will secure an optimal solution, allowing for both equity and efficiency aspects.").

<sup>87</sup> See *id.* at 100 (describing this as "the problem of 'optimal income taxation'"); *id.* at 307 ("[T]here is a rate level [of taxation] at which yield is at a maximum, so that a further increase in rates would be counterproductive.").

<sup>88</sup> See *id.* at 308-08.

<sup>89</sup> See *id.* at 321 ("The tradeoff between equity and cost considerations should be pushed to the point where the gain is matched by the price of increased administration, compliance, and efficiency cost."); *id.* at 90 ("If distributional changes are to be made, they should be designed so as to be least costly in terms of efficiency loss.").

<sup>90</sup> See MUSGRAVE & MUSGRAVE, *supra* note 6.

<sup>91</sup> *Id.*; see also Michelman, *supra* note 83, at 1212-15 (outlining the computation of demoralization costs).

<sup>92</sup> See MUSGRAVE & MUSGRAVE, *supra* note 6, at 97 (noting that "economists have had little success in answering these questions" of utility comparisons and that policy-makers often assume that marginal utility declines for everyone as wealth increases).



pigeons. As we leave these extremes, however, the difference becomes increasingly less clear. What is more, we would then face an even more difficult issue: How close to actual equality of satisfaction do we really want to come?

With the aretist function, the problems are even more severe. Before we can measure the good lost by the “payers” against the good gained by the receivers, we have to define “good” in terms of something other than the satisfaction of either in their own terms. But, to know what that is, we would have to know what goods are better than others – that metric, of course, is exactly what we are looking for. As both Aristotle and modern measurement theorists remind us, we cannot quantify the good until we know what it is.<sup>93</sup>

With both aretism and redistribution, then, our posited goal of redistributive efficiency turns out to be a bit of a will o’ the wisp, if not a vicious circle. Majoritarian democracy offers something of a way out. It can give us not only the level of redistribution that the majority wants, but also the kinds of goods and services that the majority thinks best to produce and consume. But both those majoritarian measures pose at least as many problems as they solve, as we shall see a bit later, when we turn to the general problems of “government failure.”

Before taking up government’s failures, let’s briefly review its functions. We have just seen four basic ways the state “complements” the market. Most basically, a capitalist market cannot “boot-strap” itself into existence; if there is to be a capitalist market at all, the state must provide the legal infrastructure of the market, the basic system of transferable property rights, which the market cannot establish and operate for itself. This is the state’s Ricardian function. Beyond that, the state can correct a number of technical “market failures” that would lead the market to produce results short of economic efficiency, particularly with respect to information asymmetries and externalities. This is the state’s regulatory function.

The state can also address two problems implicit in the market’s notion of efficiency itself, the twin criteria of ability and willingness to pay. With respect to the first criterion, ability to pay, the state can redistribute wealth, making some more able to pay than they were before; that is the redistributive function. With respect to the second criterion, willingness to pay, the state can choose to promote forms of production and consumption other than what people would choose for themselves, even if they had the money to pay for them. The state, that is, may choose to make people not only wealthier, but also “better,” in terms other than their own. Food stamps are for food, not cigarettes; school vouchers are for education, not beer, or even butter. Drawing these distinctions, and a wide range of others, is the state’s aretist function.

As the examples in this section have shown, our particular liberal democratic government exercises all four functions: the Ricardian, the regulatory, the redistributive, and the aretist. We now need to examine the ways that the state itself “fails,” the problems it encounters in performing these functions. These are, to put the matter more positively, the ways that the state itself depends upon the complimentary functions of other sectors.

## 2. GOVERNMENT “FAILURE.”

Like our capitalist market economy, our liberal democratic state has obvious limitations;<sup>94</sup> otherwise, our society would need but a single sector, the governmental. For our

<sup>93</sup> ARISTOTLE, RHETORIC 42–46 (W. Rhys Roberts, trans., Modern Library ed. 1954) (“Since, however, it often happens that people agree that two things are both useful but do not agree about which is the more so, the next step will be to treat of relative goodness and relative utility.”); Stanley Smith Stevens, *On the Theory of Scales of Measurement*, 103 SCIENCE 667 (1946).

<sup>94</sup> See WEISBROD, *supra* note 2, at 26 (“The undersatisfied demand for collective-type goods is a governmental ‘failure’ analogous to private market failures.”); *id.* at 41 (“Its [government’s] handicaps are its political entanglements and the weak incentives it provides for efficiency”).

purposes, we need to examine four particular kinds of “government failure,” two species in each of two genera. The first two species are based on our definition of the state in our model: the modern state is nonprofit, and its membership is nonvoluntary.<sup>95</sup> The second two are based on the particular kind of state we have: our state is liberal and democratic. This section takes up the problems attributable to each aspect of our state, beginning with the most fundamental, those shared by all modern states, then turning to the special problems of liberal democracies. As we shall see, liberal democracy addresses very deep problems of the modern state, but not without creating problems of its own.

*a. Generic Problems of the Modern State.*

The governmental sector has, in our model, two basic aspects: It is nonprofit, and it is nonvoluntary. Each aspect is essential to the state’s performance of its four functions, some of which involve redistributing, rather than creating, wealth, and some of which require coercion. Now we need to see how both aspects pose problems of their own.

*(1) The State as Nonprofit: L’etat n’est pas le roi.*

Our state, like all modern states, liberal democratic or not, is nonprofit. Louis XIV’s megalomania notwithstanding, he was not the state, nor did he own it. North Korea may well be a dysfunctional family business, as a matter of fact, but it cannot be a sole proprietorship or father-and-son partnership, as a matter of law. Under international law, citizens are not the property of their state or its rulers; they have certain rights of their own (although these rights are, admittedly, honored more in the breach than in the observance).<sup>96</sup> North Korea, then, is not some sort of national plantation where everything, including the people, are the property of the state; it is, legally speaking a cleptocracy, a government of thieves. (Not to speak harshly only of our national enemies, our Saudi Arabian allies could be similarly analyzed).

On the other hand, even as citizens are not the private property of the state, so the state is not, in any meaningful sense, the private property of its citizens. In contrast to firms in the for-profit sector and nuclear families in the household sector, no private individuals are the residual beneficiaries of its net revenues, any more than they are of the net revenues of a philanthropic entity. The modern state is thus more like a trust than a for-profit corporation, and more like a charitable trust than a private trust (although, as we shall see shortly, the terms of that trust are very vague indeed).<sup>97</sup>

This relationship between citizens and state has two obvious consequences for our analysis. The first is the most obvious: the absence of residual “owners,” any group of people entitled, in their private capacity, to the net worth of the operation. This clearly undercuts a major incentive to lowest-cost production, the profit motive or, more precisely, the proprietors’

<sup>95</sup> These limits are not inherent in the meaning of “state,” but they are the critical element of “state” in our model, and in our world. States that are voluntary and states that are “for-profit” are not inconceivable, but they are non-existent.

<sup>96</sup> See FERNANDO TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (3d. ed. 2005).

<sup>97</sup> Steinberg, *Introduction in THE NONPROFIT SECTOR*, *supra* note 5, at 2, states that “[i]n democratic regimes, government agencies are owned by an electorate and its chosen representatives” and suggests that “we regard the electorate as the ultimate owners of government assets.” But there is, significantly, no legal means of liquidation and distribution of assets at the electorate’s demand, as there is in for-profit corporations and other for-profit entities. It is particularly in this respect that states are more closely analogous to trusts, and more analogous to charitable trusts than to private trusts. For-profit firms can generally be dissolved by their residual owners at that time; private trusts can generally be dissolved at the behest of all their beneficiaries as soon as they are adults; charitable trusts can only be dissolved under court supervision, and their residual holdings can never be distributed to private individuals. See Atkinson, *Obedience as the Foundation of Fiduciary Duty*, 34 J. CORP. L. 43 (2008).

entitlement to pocket the excess of revenues over costs. We have already encountered this limitation when we compared the performance of schools in the for-profit, governmental, and philanthropic sectors. Here we simply need to situate that problem in the very structure of the state and to warn against over-generalizing from that single example.

To take the latter first, the lack of proprietary profit motive does not necessarily imply that government is always less cost-efficient than alternative suppliers, even for-profit suppliers. Sometimes government agents may, on account of motives other than profit, out-perform their counterparts in other sectors, including the for-profit sector.<sup>98</sup> Mercenary armies, for example, are notoriously unreliable, at least as compared to armies motivated by cause or country. But the problem nonetheless pervades the state's provision of any good or service, always threatening productive inefficiency. James Q. Wilson puts the problem bluntly: "[G]iven the fact that bureaucrats cannot (for the most part) benefit monetarily from their agencies' achievements, it would be surprising if they were not [productively] inefficient."<sup>99</sup>

The first aspect of the state's nonprofit status, the non-distribution constraint, is a prohibition; no class of "owners" may distribute net revenues to themselves. The second aspect is a mandate. Alongside the state's absence of residual owners are affirmative functions inconsistent with for-profit enterprises' profit-maximizing mandate. The state also redistributes wealth and promotes well-being. Our state is concerned, not just with how much money it receives, but also with how it is spent; in that respect, again, the modern state resembles a trust more than a for-profit corporation. This makes one easy metric, maximum net profit, impossible.

(2) *The State as Nonvoluntary Association: Automatic Membership and Coercive Method.*

Citizenship, or membership in a modern state, is doubly nonvoluntary: in the normal course of things, everyone is born a citizen of at least one state, and, even though one generally may later choose to be a citizen of a different state, no one can choose to be "stateless." This necessarily implies a serious problem: it is highly unlikely that any state will be able to please all its citizens all the time.<sup>100</sup> And this problem is, of course, compounded by a feature common to all states, a second element of its "nonvoluntary" character: the power to coerce its citizens to obey (limited, more or less effectively, by international human rights law). States will almost certainly include people who are not fully satisfied with its performance of its various functions.

In A.O. Hirschman's classic dilemma, some citizens may choose "exit" in the form of emigration (or secession). Others may choose "voice," efforts to change the state itself.<sup>101</sup> But neither method will ever produce total satisfaction. Those who choose "voice" over "exit" will almost inevitably find themselves in the minority on some issues, some of the time. Those who

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<sup>98</sup> See WEISBROD, *supra* note 2, at 31 (noting that "nonprofit organizations may act differently from private firms not only because of the constraint on distributing profit but also, perhaps, because the motivations and goals of managers and directors . . . differ," but warning that "whether this 'sorting' of managers, if it occurs, is an advantage or a limitation of the nonprofit form of institution is another matter").

<sup>99</sup> JAMES Q. WILSON, BUREAUCRACY 318 (1989); see also WEISBROD, *supra* note 2, at 20 (noting that "the legal prohibition on government officials' sharing in any surplus generated by the agencies they manage doubtlessly affects behavior," not only by "reduc[ing] incentives to take advantage of under-informed consumers," but also "by a corresponding loss of incentive to be efficient").

<sup>100</sup> James Douglas refers to this as government's "categorical constraint" and sees this as the political analogue of market failure in the for-profit sector. See Douglas, *supra* note 43, at 215.

<sup>101</sup> ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINES IN FIRMS, ORGANIZATIONS, AND STATES (1970).

choose “exit” over “voice” will have to go to another state or form one of their own,<sup>102</sup> neither of which will itself be entirely to everyone’s liking. Whether citizens go or stay, they will always be in one state or another, and they are not likely always convince their state to do things their way.<sup>103</sup>

*b. The Liberal Democratic State and Its Specific Problems.*

Every modern state, as we have seen, faces two kinds of problems, traceable to states’ being essentially both nonprofit and nonvoluntary. Liberal democracy can be seen as an effort to mitigate both sets of problems. As we shall see in this section, the solutions offered by liberal democracy create problems of their own.

The two aspects of the state’s “nonvoluntariness” problem are obligatory membership and mandatory obedience. Liberal democracy provides a way of resolving disagreements – majority vote – with protections for dissenters and minorities, namely, individual rights. Liberal democracies strike this balance differently. Some are more democratic, more deferential to majority will; others are more liberal, more protective of individual and minority interests. But no matter how the two elements are balanced, each creates problems of its own, with respect to the state’s performance of all four functions we have identified. Plausible efforts to check the most serious problems of the one run us directly into problems with the other.

Liberal democracy also gives us a way of addressing, at least in principle, two problems associated with the state’s nonprofit status. The state’s agents are not motivated by the economic reward of residual profits, but they may, perhaps, be motivated, or at least chastened, by its political analogue, re-election.<sup>104</sup> Similarly, the nonprofit functions of the state, redistribution and aretism, have no inherent metric, no equivalent of economic efficiency. Democracy, with the mechanism of majority vote, offers a measure. Just as the majority can monitor wasteful government managers, so it can impose positive measures of aretist redistribution: how much to spend, and for what. And liberalism, to the extent that it protects against uncompensated taking of private property for public purposes, can give legal force to the redistributive ceiling, preventing a redistributive electorate from killing its golden capitalist geese.

For all the basic problems of the state, liberal democracy thus offers, if not perfect solutions, at least ameliorative measures. But the liberal democratic state has problems of its own. We will consider the problems with democracy first, then the problems with liberalism; as

<sup>102</sup> Moving among political subdivisions helps here. See Charles M. Tiebout, *A Pure Theory of Local Government Expenditures*, 64 J. POLIT. ECON. 416 (1956). But it cannot cure the problem, as long as large amounts of taxing and spending occurs at higher levels of government. See WEISBROD, *supra* note 2, at 26 (“The geographic mobility that permits such sorting is, however, imperfect.”).

<sup>103</sup> Another possible problem with modern states may be said to be their difficulty, relative to institutions in other sectors, in providing close personal affiliations, or, worse, their tendency to produce “anomie.” On the former problem, see ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); on the latter, see FERDINAND TÖNNIES, *GEMEINSCHAFT UND GESELLSCHAFT* (COMMUNITY AND SOCIETY) (1887). It may not be possible, or desirable, for any state affiliate to be as close as members of one’s household. But this problem, such as it is, can easily be exaggerated. As the traditional Israeli kibbutzim nicely illustrate, state-like entities can effectively assume functions quite close to even the most intimate and familial. What is more, as the heroisms of “9/11” must remind us, few forms of camaraderie could exceed the closeness of fire-houses and police precincts. One has to wonder if members of these paradigmatically governmental units would have meant more either to themselves or to their fellow citizens if they had bowled in the same league.

<sup>104</sup> See MUSGRAVE & MUSGRAVE, *supra* note 6, at 117 (noting that, on public choice premises, “[t]he politician’s objective is to maximize votes so as to stay in power.”); *id.* at 122 (noting voters’ power to “throw the rascals out” as one of “the eventual safeguards of democracy” against self-seeking behavior of elected officials).

we will see, modern liberal democratic states, including our own, are primarily democratic and only secondarily liberal; that is perhaps their most basic problem.

*(1) The Democratic Dilemma: The Majority's Will or the Common Weal?*

On matters of ordinary legislation, it is the marginal voters in a liberal democracy who get what they want, subject to the liberal constraints of their constitution. This necessarily implies that those who want more from the state (or less) are left dissatisfied. Early theorists of the nonprofit sector saw the democratic state's inability to address this dissatisfaction as its primary failure, to which nonprofit organizations were a plausible response.<sup>105</sup> If some of our shop-keepers want more protection than their fellow citizens literally elect to provide through the police force, then those citizens with a higher demand for security can form a neighborhood watch. Similarly, if the parents of some school children want more or better education than the public schools provide, those parents can form PTAs to encourage better public education; or they can form private, nonprofit schools of their own.

This government failure account of philanthropic sector organizations is plausible, and probably true, as far as it goes. But it does not go nearly far enough in two related respects. First, the problem of supra-majority demand has several identifiably different aspects, having to do with the various state functions we have outlined. Second, each of these functions has a quantitative dimension. Democracy, government failure theorists point out, leaves supra-marginal voters dissatisfied. We need to see that it also leaves all citizens, majority and minority alike, with no qualitative or quantitative guide at all. Majoritarianism tells all citizens which ones of them won the vote on a proposed policy, but it tells no one how to vote on that proposal in the first place; majoritarianism thus provides a post hoc tie-breaker, not an ex ante policy guide. Liberalism can provide significant constraints on majoritarianism, but almost no positive criteria or metric of its own.

The basic problem is this: democracy gives us neither state purposes nor measures of state performance other than providing what the majority wants. In this respect, democracy is very closely analogous to market capitalism. Both are equally indifferent to what the enfranchised "buy," with votes on the one hand or dollars on the other. Indeed, democracy is, if anything, more problematic. Economics gives us a neat minimum, the legal conditions of capitalism, and two more quite viable metrics: productive efficiency and economic, or allocative, efficiency. Democracy gives us a measure analogous to the functional measure of the Ricardian state, the minimum conditions for democracy. What is more, the metric of productive efficiency is applicable, in principle, to all the state's functions, and we can derive, on the analogy of economic efficiency, the metric of democratic efficiency.

But that last metric is quite peculiar. It can override all the metrics we might import from the for-profit sector to measure the state's market-supplementing functions. Even more seriously, democratic efficiency gives us no independent guidance for the state's two other functions, re-distribution of wealth and promotion of welfare. All it tells us, at bottom, is to give the majority what it wants. If we try to produce additional guidelines by democratic means, we run afoul of liberal limitations.

*(a) Democratic Failure and the State's Market-Supporting Functions.*

<sup>105</sup> See, e.g., WEISBROD, *supra* note 2, at 21 (explaining the role of nonprofits mainly as a response to the under-satisfied demand of supra-majority voters); see also Douglas, *supra* note 43 (outlining a similar supra-majority rationale for the philanthropic sector). See also MUSGRAVE & MUSGRAVE, *supra* note 6, at 74 ("Except for a society in which preferences are so homogeneous as to permit unanimity, some voters will remain dissatisfied.").

Market capitalism, poses for itself two problems it cannot by its own means solve: producing its own infrastructure of property law, and correcting its own intrinsic failures, principally information asymmetries and externalities. But its own functional standard, economic efficiency, both identifies these problems and provides a metric for measuring their magnitude. A significant function of government in our system is to address these two problems, to provide the legal regime of market capitalism and to regulate that system so as to overcome its inherent problems. We now need to see that, in addressing both sets of problems, liberal democracy poses a serious problem of its own: its majoritarian metric can, and probably often does, supersede and undermine the market's own metrics.

Economics gives us a minimal measure of government involvement in the for-profit sector – creation and maintenance of minimum conditions of capitalism. This is a hypothetical imperative<sup>106</sup>: if you want market capitalism, your state must provide this infrastructure. What we need to note here is that democracy does not guarantee either the selection of the end or the provision of the means. The appeal of capitalism as an end is itself instrumental. This is the best way, or at least a very good way, of getting consumers what they want. The choice of means follows, as a matter of instrumental logic. If you want capitalism, you must provide the necessary infrastructure. But notice that neither choice follows from democracy: a majority can choose a non-capitalist economy, perhaps because it favors something above maximum production, perhaps because it believes, rightly or wrongly, that capitalism does not provide maximum production. That question, real though it is, need not concern us here; our society has chosen market capitalism, and we have taken that choice as a given in our analysis. We have granted, that is, the premise of the hypothetical imperative: we do, in fact, want market capitalism.

Our concern is with the conclusion, the imperative that follows from accepting the hypothetical end: A polity that has chosen market capitalism should provide at least its minimally adequate institutional infrastructure. But a majoritarian polity may quite possibly choose capitalism without adequately funding its essential institutional infrastructure. That would be instrumentally irrational but – critically – it would not be undemocratic.<sup>107</sup>

A similar analysis applies to the state's regulatory function. A majority of voters could, in principle, reject this function entirely, in favor of a truly minimal, Ricardian state: no more government than absolutely necessary to preserve private property and a market economy. Anything beyond that is, by definition, the regulatory state, a state that functions, not just to make markets possible, but to make them more efficient. A majority of voters might decide not to fund the government's regulatory function up to the level that we have identified as regulatory efficiency, the level at which the last dollar spent on regulation produces exactly one dollar more in economic efficiency.<sup>108</sup>

The problem with respect to the two market-corrective functions of the state, then, is this: The democratic metric of majority rule may, and sometimes does, override the metrics that economics provides. Only one of these overrulings however, is, strictly speaking, irrational: the democratic decision to have a capitalist economy without the minimum infrastructure. The other

<sup>106</sup> IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 36 (Lewis White Beck trans., New York: Macmillan 1969) ("The hypothetical imperative . . . says only that the action is good to some purpose, possible or actual.").

<sup>107</sup> Our constitution's liberal substantive due process constraint of "minimum rationality" is not much help here; it forbids the demonstrably stupid, but it does not mandate the demonstrably sensible. Here again, it manifests a form of negative, not positive, liberty.

<sup>108</sup> One could make a very good case that this is precisely what happened in the recent economic crisis; Alan Greenspan was, as we have seen, a Randian. See *supra* text accompanying note 55.

two overrulings – not to have a market economy at all or not to ensure maximum economic efficiency – are not based on capitalist criteria, but they are not necessarily irrational. They could reflect the application of other criteria. The point is that democracy provides no such criteria, except the tautological one: what the majority wants. It gives no reason for the majority to choose one way over another.

Democracy, then, is subject to under-providing both the necessary infrastructure of market capitalism and the optimal level of market-correcting regulation. It can, accordingly, fall short under the appropriate metrics of its Ricardian and regulatory functions, respectively. Might democracy not also err in the opposite direction? Might it not either provide more infrastructure than necessary for the minimal capitalist production or impose more regulation than necessary to make capitalist production optimally efficient? It very well might, for either of two very different reasons. It might, on the one hand, spend more than minimal or optimal capitalism requires on account of a miscalculation. The democratic state might simply over-estimate the appropriate level of spending for either minimally sustaining or optimally maintaining capitalism.

But we need also to note a second possibility: What looks like over-sustaining or over-regulating by those market-based metrics may be something else entirely. Democracy may be pursuing two very different ends, either redistribution or aretism. Thus, the majority might ban fortified wine, not as a response to information asymmetries or external costs associated with its consumption, but to give a greater share of the alcoholic beverage market to beer manufacturers or to give the Temperance Movement a level of sobriety beyond what its members could expect from even a perfectly functioning market. But why would the state want to transfer wealth to beer producers or to make the citizenry more virtuous in the eyes of tee-totalers? More generally, what standards does democracy give for the state's redistributive and aretist functions?

*(b) Democratic Failure and the State's "Market-Supplanting" Functions.*

The regulatory state operates under this hypothetical imperative: if you want to maximize economic efficiency (and you have no competing social goals), regulate capitalist markets so as to overcome their technical failures (and do not otherwise interfere!). A majority of citizens might refuse to grant this condition in either of two opposite ways. On the one hand, they may opt against maximizing economic efficiency in favor of keeping government small, closer to its Ricardian minimum. On the other hand, a majority of voters might opt against single-minded devotion to economic efficiency. They might choose to advance competing social goals, which may be at odds with each of economic efficiency's basic requirements, willingness and ability to pay.

This is, of course, very much what our own citizens have chosen. We do not fully grant the ability to pay criterion; we vote for a measure of wealth redistribution. Nixon, remember, had his negative income tax. Nor do we fully grant the willingness to pay criterion. We want to ensure, at least to some extent, that people get, not just what they want, but also what they need, what is better for them to have; Food Stamps are for food, not beer and cigarettes. The state's redistributive and aretist functions, we have seen, offer a wide range of options. But that very range also poses a problem. How much redistribution are we to have, and what "goods" are we to consider "better"?<sup>109</sup>

We have already seen that neither the redistributive nor the aretist function provides its own metric. Here we need to see that democracy does not offer much help. "Government failure" with respect to market-supplanting functions of the state is even more fundamental than

<sup>109</sup> See Fleischer, *supra* note 67.

with respect to market-supporting functions. With respect to these latter functions, as we saw in the previous section, the majority may override the market's own intrinsic metric, economic efficiency, but at least there is a metric to override, a measure of the cost the majority's "mistake" or the price of its non-efficiency preference. With respect to redistribution and aretism, however, the market gives no metric of its own, precisely because these two state functions are intended to supplant features inherent in the market functioning in accord with its own metric, what consumers are willing and able to pay.<sup>110</sup> Democracy provides virtually no independent criteria of its own. Thus, with respect to redistribution and aretism, democracy is very nearly totally without normative guidance.

Majoritarian democracy, especially representative majoritarian democracy, produces perverse incentives to violate even the basic, barnyard logic of these ceilings and floors. The problem is that the rationality behind these metrics operates only at the systemic level, not at the level of individual voters. For individuals, two other principles apply: *apres moi, le deluge* (after me, the deluge), and don't pick up the check. It makes sense, at the systemic level, not only to refrain from killing the goose that lays the golden egg, but also to feed it. At the individual level, however, it makes good sense not to feed the goose, if you can pass that bill to someone else (or if someone else will pick it up). Similarly, at the individual level of analysis, it makes very good sense to kill the goose, if you get to eat all the goose yourself, but only a pro rata share of the eggs; it makes all the more sense if your goose-eating is today, and your egg-sharing tomorrow. The problem, to summarize it aggressively, is the union of politics and economics, the critical insight of public choice theorists.<sup>111</sup> From their perspective, the problem is not that majoritarianism leaves supra-majority demand unsatisfied, the "government failure" hypothesis used to explain the function of philanthropy. Rather, the problem is that of rent-seeking, efforts to transfer wealth to oneself, not to make the economy bigger, the goal of wealth maximization, but to increase one's own share at as little personal cost as possible.<sup>112</sup>

Even if the perverse incentives of individual voters and their representatives do not lead to starving or slaughtering the goose that lays capitalism's golden eggs, there are other problems, between the redistributive floor and ceiling. In setting those parameters and in trying to identify the chimeric metric of optimal, or efficient, redistribution, we have been taking the Robin Hood perspective: How much should we take from the rich to give to the poor? Similarly, in setting the level of economically efficient redistribution, we took what was, or should have been, the perspective of Good King Richard and his conscientious clerks: What kinds and levels of redistribution will make the realm, as a whole, richer? But we have overlooked the perspective of Bad Prince John and the Sheriff of Nottingham: How much can I take from rich and poor alike, to keep for myself? That is essentially what public choice theorists mean by rent-seeking. In a democracy, everyone is free to join the party of the Black Prince and the notorious Sheriff, to form majority coalitions that siphon off the wealth of others for the benefit of coalition members, only.

To see this latter problem more clearly, we must reconsider our original examples of government redistribution, food and education for the poor. Both, we need to see, implicitly

<sup>110</sup> See MUSGRAVE & MUSGRAVE, *supra* note 6, at 91 ("Standard economic analysis . . . does not tell us what state of distribution should be our goal, i.e., what the criteria for distributional justice and fairness should be.").

<sup>111</sup> See, e.g., ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1956); see also MUSGRAVE & MUSGRAVE, *supra* note 6, at 117 (summarizing public choice theory and concluding "[i]n this way, the politician's competition for votes resembles the producer's competition for consumers and the preferences of voters are served in the process").

<sup>112</sup> See, e.g., JAMES M. BUCHANAN & ROBERT D. TOLLISON, *THE THEORY OF PUBLIC CHOICE* (1984).



involved two appealing but adventitious elements we now need to remove: the redistribution in each example was both progressive and aretist. Most people think of the government's redistributive function as properly progressive, moving money or other forms of wealth from the richer to the poorer, like Robin Hood. And the redistributive measures in both our examples, most would agree, made the recipients better off: better fed, better educated.<sup>113</sup> Neither, we now need to notice, need be true; democratic redistribution is inherently neither progressive nor aretist.

To highlight these problems with purely democratic redistribution, let us consider an example that removes both of the tendentiously appealing elements of our earlier examples. Consider, then, this admittedly grim prospect. In a pure democracy, the wealthier fifty-one percent majority decide to totally expropriate the wealth of the less wealthy forty-nine percent minority and, for good measure, to reduce that poorer minority to slavery. The majority, that is, can in principle play the part of a very aggressive Sheriff of Nottingham.

What democracy permits, of course, it does not require – nor, *a fortiori*, do its proponents recommend. Few, if any, proponents of redistribution have anything quite so purely democratic in mind, probably because they have either a higher view of their fellow citizens or a lower view of absolute democracy than my example implies. We expect the majority of our fellow citizens to be at least a little less selfish, or we expect our liberal constitution to be a bit more protective of minority interests. We tend to think of the state's wealth redistribution as something unselfish rather than self-aggrandizing, mutually helpful rather than hedonistically individualist.

Still, as the enslavement example illustrates, it need not be so. The point is not that voters in a democracy cannot act in a principled, even altruistic way. They can, and perhaps often do. The point is that democracy itself does not provide those principles, altruistic or otherwise. In principle, democracy is open to principled voting. But it lacks its own principles for voting – *as a matter of democratic principle*.

Democracy can place anti-majoritarian limits upon itself; democracy can make itself more or less liberal. Thus, in our own system, the constitution affords fundamental rights and a panoply of substantive protections against majoritarianism.<sup>114</sup> More generally, it prohibits wholly irrational legislation and imposes a parallel set of “rules of law,” procedural due process protections. Some combination of these would almost certainly stop both the expropriation and the enslavement in our “soak the poor” example.

But notice two critical points here. First, these liberal principles are universally recognized as counter-majoritarian; they do not flow from democracy but rather constrain democracy. Second, because these liberal principles themselves rest on the democratic principle of popular sovereignty, they can be removed by democratic means. In our legal regime, the relationship of democracy and liberalism is not that of the chicken and the egg; democracy comes both first and last. Our liberal democracy enshrines no liberal principle that cannot be democratically removed. Every provision of the Bill of Rights, every Amendment, even the

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<sup>113</sup> Nor, we should notice, is progressivity of redistribution to be automatically equated with any obvious form of social progress. As anyone who has agonized in the subway before a panhandler has realized, your handout may as likely buy alcohol as wholesome food. At a more general level, the cycle of dependence created by the traditional welfare system is not wholly a chimera conjured up by the hard-hearted and tight-fisted. DANIEL PATRICK MOYNIHAN, *THE NEGRO FAMILY: A CASE FOR NATIONAL ACTION* (1965). Apparently reflecting the same sentiment, the courts have denied charitable status to organizations that simply give money to the poor.

<sup>114</sup> This is the gravamen of the famous “footnote four” from *Carolene Products*. *Carolene Prods. Co. v. U.S.*, 323 U.S. 18 (1944).

Constitution itself, is subject to amendment. “We the People” can, in principle, literally do what we will, have what (or who) we want.

Thus, the liberal limits in our Constitution would slow but not stop a “soak then enslave the poor” program. Its enactment would require three conceptually distinct steps: first, amending the constitution to remove the Fifth Amendment’s requirement of compensation for the taking of private property and the Thirteenth Amendment’s prohibition of slavery; second, amending the Constitution to permit legislation by referendum; finally, a popular vote for the radically pro-majority redistribution. In a liberal democracy like the United Kingdom, with absolute Parliamentary sovereignty and an essentially unicameral legislature, this should be possible in a single vote of the legislature elected on the “redistributive” platform.<sup>115</sup> The United Kingdom is thus more democratic, though less liberal, than the American Republic.

This is not to say that democracy implies no redistributive metric of its own. Our earlier comparison of market and government failures suggests another, more basic comparison, which provides an important exception to democracy’s general absence of a positive metric for redistribution. Capitalist markets require the state to supply a minimum of institutional infrastructure, the law of private property. To supply this infrastructure, the state must undertake a measure of redistribution; it must tax and spend to establish and maintain a legal system.

The maintenance of democracy, not surprisingly, implies a similar kind of institutional infrastructure.<sup>116</sup> Democracy and market capitalism both come with a hypothetical imperative: if you want these political and economic systems, you must ensure their essential “infra-structure,” and some of this infrastructure, the legal institutions of the market and the political system, must come from the state, since only the state has the necessary coercive power to enforce and finance them. This hypothetical imperative gives democracy, like the market, a measure of how much the democratic state must spend, and for what, if it is to be at least minimally democratic.

As market capitalism depends on a legal system of private rights to use and exchange property, so a democracy depends on a legal system of individual rights to vote, elections to record votes, and governmental machinery to carry out the people’s will as expressed in elections; if democracy is to be representative rather than direct, it must also provide the infrastructure for a legislature. Whether direct or representative, democracy must also have an executive to carry its laws into effect and a judiciary to ensure at least minimal compliance.

It is thus possible to speak of the minimum of redistribution and aretism necessary for a democratic government, even as it is possible to speak of a “Ricardian” minimum for market capitalism.<sup>117</sup> May we press this parallel between democracy and market capitalism a step further? We see with market capitalism that we can envision, not just a minimum, but also an optimum. The function of the regulatory state, as we outlined it, is to produce just such optimally-functioning market capitalism, one that maximizes economic efficiency. Might we not, by parity of reasoning, imagine an optimally, not just minimally, functioning democracy? Couldn’t we derive from “minimal democracy” a standard of “optimal democracy”? That would allow us, with democracy as with market capitalism, to speak in the comparative degree, even the superlative, not merely the positive – about democracy that is better than the minimum, even the best.

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<sup>115</sup> Subject now, most likely, to an appeal to the European Union Court of Human Rights.

<sup>116</sup> Weisberg’s analysis tends to overlook this problem: it assumes the routine functioning of a liberal democratic state, even as market failure theorists tend to overlook the “infrastructural” problem of markets.

<sup>117</sup> As we shall see, *infra* Part III.B.3., democracy, like capitalism, also implies cultural, not just legal, conditions.

This parallel to optimal market capitalism, appealing though it is, is not particularly promising for our purposes. Once we identify its analogue of market capitalism's optimizing metric, economic efficiency, we see that it gives very little more help with our basic question: How much redistribution is appropriate, and for what?

On the analogy of economic efficiency, the market's giving consumers more of what they are willing and able to pay for, we can postulate a metric of democratic efficiency, the state's giving voters more of what they are willing and able to vote for. Most basically, the state could provide optimal, not merely minimal, enforcement of election laws, even as it could move toward optimal enforcement of property laws: more police on the beat, more "watchers" at the polling booths. Beyond that, the state could take steps to eliminate the electoral equivalent of "market failures" and externalities.<sup>118</sup> It could sponsor debates among the candidates, subsidize their election campaigns, even supply its own information about the hidden "costs" of their proffered "products," the planks of their political platforms.

We could even reform the state's own structure to make it more democratically efficient. Our respective states have done just that, with such measures as initiatives, referenda and recall elections, all the darlings of early twentieth century Progressives of both political parties. In the same era, and in the same democratizing spirit, the Seventeenth Amendment to the Federal Constitution<sup>119</sup> replaced the election of US senators by state legislatures with direct election by the people. Another step toward democratic efficiency would be to replace the cumbersome old Electoral College with the direct election of the president and vice president.

We could "cut out the middleman" even more radically, eliminating legislatures altogether in favor of some sort of direct, electronic democracy. Robert Paul Wolff outlined a version of this two generations ago;<sup>120</sup> computer technology would make this immanently doable today.<sup>121</sup> For something even more radical, we could graft Wolff's electronic democracy onto the very roots of Western democracy, to try cases, not before petit juries of a dozen or so citizens, but before truly grand juries of the entire population. We could, in short, make our entire polity much more "democratically efficient," much more capable of giving the people what they want (at lowest input cost) almost as soon as they want it.

But here we have to be careful. If we try to expand "more democratic" beyond merely making it easier for people to express their preferences among the available options, in the direction of something like "more meaningful participation,"<sup>122</sup> we approach a problem. If that means making people somehow better than they are, or currently want to be, then we are applying some measure of "better" other than what the people want, and thus taking our democratic reforms beyond democracy itself. We will have come full circle. Remember that we turned to democracy for guidance on the state's artist function, how to make its citizens better. Now we would be invoking some artist standard to improve democracy itself.

Even if we resist that move to make democratic participation "more meaningful," democratic efficiency is circular in another sense. When we turn it to questions of redistribution

<sup>118</sup> See MUSGRAVE & MUSGRAVE, *supra* note 6, at 121 ("[P]olitical (like economic) choice is frequently warped by inadequate information.").

<sup>119</sup> U.S. Const. amend. XVII.

<sup>120</sup> See generally ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* (Univ. Cal. Press ed. 1998).

<sup>121</sup> *Electronic Athens*, N.Y. TIMES (Sept. 20, 2009).

<sup>122</sup> See, e.g., Frank Michelman, *The Supreme Court, 1968 Term – Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1960) (seeking to ground a right to minimum welfare in increasing participation in the political process); see also Frank Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L. Q. 659.

and aretism, how much wealth the state should redistribute, and for what goods and services, we get a peculiar answer: whatever the majority of the voters want.<sup>123</sup> At best, this radically redefines our questions about redistribution and aretism; at worst, it simply begs them. Appropriate redistribution, qualitatively and quantitatively, becomes precisely what the people want and nothing more; that is what democratic efficiency is, by definition.

In that respect, democratic efficiency is the perfect government sector equivalent of its for-profit sector twin, economic efficiency. Democracy gives voters no more direction about how they should vote than market capitalism gives consumers direction about what they should buy. More “efficient” democracy, in other words, gives no direction to government’s market-supplanting functions, no measure of how much wealth to redistribute, or what to redistribute it for – beyond, again, what it takes to make all government functions deliver, at lowest cost, what the majority wants.

In making voter preference, like consumer preference, sovereign, democratic efficiency is quite the twin of economic efficiency. But our example should remind us that they are fraternal, not identical twins. In one important respect, democracy is Jacob to market capitalism’s Esau. Though capitalism may well be the older sibling, democracy can, if it will, have the upper hand. Capitalism is fundamentally a creature of law. In democracy, law is the servant of the people’s will. If in their sovereign power the people decide to kill the goose that lays the golden eggs, that is entirely within their prerogative. Expropriation, remember, is always only two steps away: first repeal the just compensation clause, then enact the confiscatory statute. And, so, remember, is enslavement. The people are not only entitled to expropriate the capitalists’ property; they are equally entitled to enslave both the capitalists and the workers. They can as easily repeal the Thirteenth Amendment’s guarantee of freedom as the Fifth Amendment’s protection of property.

This is the basic failure of democratic government with respect to the state’s redistributive and aretist functions. Once we ask a government, as a democracy, to give people more than they earn in the market place, by a measure other than what the majority chooses to give, individually as private gifts or collectively through state redistributions, then we are asking more than a democratic government can, on democratic principles, be made to deliver. We are asking, in effect, not for the people’s will to be done, but for some vision of the public good to be served. That is not the task of even a perfectly efficient democracy; that is the task of an aretist republic, a state devoted, not to doing the people’s will, but to serving the public good, or, in more old-fashioned terms, the common weal. The important thing to notice here is that democracy, in and of itself, offers no such supplementary value, no terms in which to state, much less standard by which to measure, the public good.

*(c) Democracy’s Basic Problem: No Democratic Constraints on the People’s Will.*

Democracy itself offers little guidance, at either the systemic or the individual level of analysis, to guide the state in its various functions. It cannot hold the state to the metrics that the capitalist market implies for its Ricardian and Regulatory functions, either for minimal market infrastructure or for maximum economic efficiency. More seriously still, it offers only the most minimal metric for its other two functions, the redistributive and the aretist, nothing beyond what is necessary to maintain a system in which citizens can express their preferences politically and have those preferences carried out.

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<sup>123</sup> See MUSGRAVE & MUSGRAVE, *supra* note 6, at 9 (To determine the level of state provision of public goods, “[v]oting by ballot must be resorted to in place of dollar voting.”).

Democracy can, of course, easily accommodate such values as expressed in the preferences of a majority of voters. The majority can be altruistic as well as self-aggrandizing. But the preferences of voters can produce, in theory and in practice, very peculiar redistributions if tested against any criterion other than voter preference itself. Think only of our hypothetical, hyper-democratic program: “Soak the poor, then enslave them.”

(2) *Liberalism’s Dilemmas: Too Much Guidance, and Not Enough.*

Liberalism offers real constraints on these scary popular preferences, but liberalism is, in our legal arrangements, a choice of the people that they could choose to change. There is more bad news, which we will take up in the next subsection. On the one hand, along with liberalism’s “rule of law” procedural values, comes an inevitable constraint of official discretion. On the other hand, along with liberalism’s neutrality toward substantive life plans comes a severe limit on how much liberalism can either guide or limit democracy. On this latter point, the bottom line is this: even if democracy leaves liberalism in place, liberalism offers democracy very little of what we are looking for, guidance as to government’s redistributive and aretist functions.<sup>124</sup>

(a) *Liberalism’s Procedural Limits: The Liberal State as Bureaucracy.*

A primary virtue of liberalism is constraint on excessive exercise of arbitrary power by the state, particularly to the detriment of individual citizens. “Ours,” we pride ourselves on saying, “is a government of laws, not of men.” At the same time, we realize of our law, as of all law, an equally significant principle running in the other direction: “The letter killeth, while the spirit giveth life.”<sup>125</sup> This is the tension reflected both in the historical distinction between law and equity and in the contemporary analysis of rules against standards. We chafe under the rigidity of bright-line, black-letter rules, even as we balk at letting governmental decisions vary with the size of the chancellor’s proverbial foot.

Government failure theorists have long noted the irreducible element of “legalism” in the actions of the liberal state and its agents.<sup>126</sup> That choice of “law” over “equity,” in turn, poses dilemmas of its own. To the extent that we try to make eligibility criteria precise and finely-grained, we raise administrative costs, which come, of course, at the expense of substantive goals in this program or some other. Yet, if we make eligibility requirements less precise, we face another dilemma:

- (1) Eligibility can be more comprehensive, which would avoid excluding any intended beneficiaries but would increase the cost of the program by including some unintended beneficiaries; or (2) it can be made more restrictive, which would reduce costs and decrease provision to unintended beneficiaries, but in the process, would inadvertently exclude more people for whom the program is intended.<sup>127</sup>

<sup>124</sup> Nor, as we shall see, does it give much, if any, guidance for the individual citizen in the exercise of the political and civil rights it guarantees. See *infra*.

<sup>125</sup> Douglas, *supra* note 43, at 46 (“Spontaneity, in turn, can release that style of human warm and loving care that a generalized pattern of defensible rules tends to crush.”).

<sup>126</sup> *Id.* (“The democratic state has to treat all its citizens equally, which is what we mean by equality before the law.”); *id.* at 49–50 (“These needs – to ensure equality of treatment throughout a jurisdiction and to be able to defend its decisions politically – together generate the morass typical of bureaucratic red tape . . . the rigidly rule-bound requirements and restraints that [state] administrators are almost forced to impose....”); WEISBROD, *supra* note 2, at 25 (“In a democratic society, government must make its services available to everyone who meets certain conditions – the ‘equal access’ constraint.”).

<sup>127</sup> WEISBROD, *supra* note 2, at 25.

To the extent that we tighten rules of government programs, we make them more costly to administer; to the extent that we loosen those rules, we make them more or less under- or over-inclusive, either way making the program less productively efficient. And equality of treatment is only one procedural constraint on liberal governments, and thus only one source of administrative costs: liberal governments must also be both transparent in their dealings and accurate in their accountings.<sup>128</sup>

These problems are not as great as government failure theorists would have us believe, nor do philanthropies offer quite so clear a remedy as they have suggested.<sup>129</sup> Much more serious problems lie elsewhere: in the substantive, as opposed to procedural, limits that liberalism places on democracy.

*(b) Liberalism's Substantive Limits: Limited Guidance – and Limits on Guidance – from the State.*

If we look to liberalism to guide the democratic state in performing its four functions, we come upon a paradox: Depending on where we look, we find either too little guidance, or too much. To unpack this paradox, we will need to draw several distinctions within liberalism itself. First, we must distinguish Constitutional liberalism, the liberalism embodied in our constitutional order, which is essentially classical, negative liberalism, from theoretical liberalism, which includes positive liberty, and thus covers a much wider spectrum. Constitutional liberalism, we shall see, permits our democracy a wide range of options in directing redistribution and aretism, the two government functions for which we have yet found only minimal metrics. This accounts for the first half of the paradox: It is Constitutional liberalism that provides too little guidance.

What, then, of theoretical liberalism? Along the spectrum of liberal theory, we will need to distinguish right liberalism, which is essentially the libertarianism of our minimalist, Ricardian state, from left liberalism, which is something like the social democracy of the European-style welfare state.<sup>130</sup> There is, of course, a wide range between these poles. But, theoretical liberalism's right and left poles give us almost diametrically opposed positions on the two government functions for which we particularly need more precise metrics, redistribution and aretism. The libertarian right would ban all aretist redistribution beyond the minimum necessary for a liberal democratic polity and a capitalist market economy. The social democratic left would require a welfare state of at least Scandinavian size and scope. The long spectrum that runs between these left and right poles offers an almost infinite array of intermediate positions on aretism and redistribution. This accounts for the second half of the paradox: It is theoretical liberalism that provides too much, an embarrassingly rich range of measures for government's four functions, some radically at odds with others.

Is there no way to bring the two halves together? Here we reach the crux of our paradox. Our democracy cannot choose among the various forms of theoretical liberalism without violating the terms on which all liberals, left to right, agree. Very near the essence of theoretical liberalism is the neutrality principle, which insists that the state impose no vision of the ultimate human good. The one thing all shades of liberalism take umbrage at is the state's imposing any

<sup>128</sup> See Douglas, *supra* note 43, at 50 (noting public administrators' complaints about lax record-keeping by philanthropic affiliates).

<sup>129</sup> See Atkinson, *supra* note 1.

<sup>130</sup> See PHILLIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 9 (1997) ("I distinguish between left-of-centre liberals, who stress the need to make non-interference an effective value, not just a formal one, or who embrace values like equality or the elimination of poverty in addition to the value of non-interference, and right-of-centre liberals – classic liberals or libertarians – who think that it is enough to establish non-interference as a formal, legal reality.") (internal citation omitted).

ultimate truth, even one of liberalism's own, as the permanent constitutional order. But to take a position on the state's redistributive and aretist functions is to move very much in that direction. Those functions, remember, operate to make citizens better or better off. If the state were to be too insistent on what better is, it would have violated the neutrality principle, and thus ceased to be liberal. Theoretical liberalism embraces various aretist positions; to ensconce any kind of aretism in the Constitution is, for theoretical liberalism, to approach a contradiction of its own terms.

To approach, of course, is not to overstep. Our Constitution could embrace some measure of aretism. On a fairly flexible reading of the neutrality principle, that would not be to impose a particular view of the good, since the Constitution can always be amended. In that sense, our Constitution does indeed embrace one form of government, representative democracy, as "best." But we are looking for aretist guides for both voters and representatives with that system, and here our Constitution contains only prohibitions, not positive mandates.

*i) The Limits of Constitutional Liberalism: The Absence of Two Positives and the Presence of a Negative.*

Constitutional liberalism gives democracy essentially no positive guidance in the way of politics or ethics, the two principle realms of classical normative philosophy. This is because Constitutional liberalism is a species, though not the only species, of classical liberalism,<sup>131</sup> and classical liberalism is essentially negative, in two related ways. Most obviously, classical liberalism famously favors negative, rather than positive, liberty.<sup>132</sup> It tells the state what it cannot do to the individual; in its own terms, it recognizes individual liberties or rights. Its motto is, "Ask not what your country can do for you; ask what your country *can't* do *to* you." The majority of your fellow citizens can vote to tax and spend to help you if they like, just as those wealthier than you can, without the prompting of compulsory laws, give you the crumbs from their table, even invite you to sit at their feast. But nothing in a liberal democratic polity, any more than in a capitalist market economy, compels any such concern for others, unselfish or otherwise. Nor does either sector necessarily require more of the other in the way of redistribution. A capitalist market economy requires only a night watchman state (and not even a liberal or democratic one at that); a liberal democracy requires only an economy that satisfies the median voter. That economy need not maximize economic efficiency, much less redistribute wealth, one way or another.

Classical liberalism is also negative in a second, less obvious way. The classically liberal state not only guarantees its citizens negative liberty, wide freedom from state coercion; it also declines to tell its citizens much about how they should exercise their liberty. It is, in other words, virtually silent about ethics – how individuals should operate in the sphere of freedom that classical liberalism guarantees them.

*(a) Constitutional Liberalism's Limited Politics: Negative vs. Positive Liberty.*

Our current constitutional regime is one of negative liberty, not positive liberty.<sup>133</sup> In the words of Judge Posner, "the men who wrote the Bill of Rights were not concerned that

<sup>131</sup> See Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* (Oxford Univ. Press 1958); see also PETTIT, *supra* note 130, at 8–9 ("[L]iberalism has been associated over the two hundred years of its development, and in most of its influential varieties, with the negative concept of freedom as the absence of interference.").

<sup>132</sup> PETTIT, *supra* note 130 (defining "non-interference" as the basic notion uniting all schools of liberal thought).

<sup>133</sup> See *Barksy v. Bd. of Regents*, 347 U.S. 442, 472–73 (1954) ("The Bill of Rights does not say . . . what government must give, but rather what it may not take away."); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th

government might do too little for the people but that it might do too much to them.”<sup>134</sup> Our Constitution contains many liberal restrictions, substantive and procedural, on what the government can do to you. It contains virtually no mandates of what our government must do for you. To be sure, our democracy has generally been generous to at least some of its citizens, if sometimes more than others. We have had both the New Deal and the Great Society. But, all these programs are matters of grace not right. All of them have been questioned as illiberal in theory,<sup>135</sup> even as many have been attacked, sometimes successfully, in fact. Our fundamental law does not mandate even minimal care for our fellow citizens, much less brotherly love.<sup>136</sup>

That said, even “negative liberty” implies some important positive pre-conditions.<sup>137</sup> Just as we have identified the minimum redistributionist and aristocratic actions necessary for a minimal market economy and a minimally democratic state, so we can sketch them for a minimally liberal state. But the demands that a minimal democracy makes on the state are remarkably small, and in the case of Constitutional liberalism, the necessary minima are only a little more generous. Constitutional liberalism implies a judicial apparatus in which citizens may assert that the state has violated the civil and political rights that Constitutional liberalism guarantees them; this judiciary need be no “bigger” than required to guarantee the minimum property rights essential to market capitalism and the electoral rights essential to democracy.

Our Constitution's liberalism does, of course, mandate one set of positive guarantees, but that single exception tends to prove the general rule. In narrow range of circumstances, the state will provide a lawyer to an indigent citizen whom the state itself threatens with deprivation of a fundamental right. For example, if a citizen cannot afford a lawyer to defend against the state's criminal charges, the state must provide one at its own expense.<sup>138</sup> So, too, in a civil proceeding the state brings to have a citizen incarcerated as insane. In each case, the citizen's right to positive assistance from the state is only triggered when the state attempts to interfere with the citizen's basic liberty, and only then in the most intrusive of ways. The state can, in routine civil matters, sue to take your property with compensation; it is up to you to challenge that taking as improper or the proffered compensation as inadequate, with legal counsel only if you are able to pay for it yourself. Thus our Constitution's only positive guarantee is merely an adjunct of its prohibition of governmental over-reaching. As long as our state chooses to leave its citizens alone, Constitutional liberalism provides them nothing else. Efforts to find, in our Constitution, a positive guarantee of even minimum sustenance<sup>139</sup> or to recognize poverty as a suspect class<sup>140</sup> have repeatedly failed.

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Cir. 1983) (“[T]he Constitution is a charter of negative rather than positive liberties.”). Many other liberal democratic constitutional regimes, we should note, guarantee positive as well as negative liberty. See CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 127–38 (2004).

<sup>134</sup> *Jackson*, 715 F.2d 1200, 1203 (7th Cir. 1983).

<sup>135</sup> See, e.g., EPSTEIN, *supra* note 16.

<sup>136</sup> See ELIZABETH WEEKS LEONARD, *STATE CONSTITUTIONALISM AND THE RIGHT TO HEALTH CARE* 3–11 (copy on file with author) (noting absence of federal constitutional right to health care and other basic necessities).

<sup>137</sup> See STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COSTS OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999) (noting need for expensive government action to protect civil rights of classical liberalism, including voting, free exercise of religion, and freedom of speech); SUNSTEIN, *supra* note 133, at 6–7 (same); Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOYOLA L. REV. 1207, 1214–15 (1993).

<sup>138</sup> *Gideon v. Wainwright*, 72 U.S. 335 (1963).

<sup>139</sup> *DeShaney v. Winnegago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989) (no right to protection from child abuse); *Lindsey v. Normet*, 405 U.S. 56 (1972) (no substantive due process right to housing); *Dandridge v. Williams*, 397 U.S. 471 (1970) (no substantive due process right to welfare); but cf. *Youngberg v. Romeo*, 457 U.S.



*(b) Constitutional Liberalism's Minimal Ethics: The Paucity of Passive Virtues.*

Constitutional liberalism, we have just seen, has decidedly limited implications for our government's four functions. Here we need to note a distinct but related vacuum. Classical liberalism, the genus of which our Constitutional liberalism is a species, has little to say about how citizens, even citizens committed to liberalism, live within the liberal state (and market economy).<sup>141</sup> Classical liberalism is thus a political theory in the strict sense, and it does not imply a corresponding ethical theory. It does not even imply that, in their individual lives, its adherents do much, if anything, to advance liberal political arrangements. If they do, it may be good for liberalism, but it is not good by any standard internal to liberalism (except systemic self-preservation, which is at odds with liberal neutrality).

Our government can, of course, encourage certain virtues, and so it does. As we saw in Part II, it mandates primary education, to ensure that future citizens can support themselves in our capitalist market economy and function in our liberal democratic polity. So, too, the state can include in that curriculum, civics and social studies courses, courses designed not only to help future citizens do well for themselves, but also to encourage them to "work and play well with others." But here our state approaches a significant limit of Constitutional liberalism, a limit that is grounded in theoretical liberalism's neutrality principle.

*(c) The Presence of a Negative: Constitutional Limitations on the State's Promotion of "Life-Plans."*

As we turn from Constitutional liberalism's extremely limited positive guidance for the democratic state to its limits on that state's promotion of life-plans, we encounter at the very outset an apparent paradox. Although Constitutional liberalism limits the state in its promotion of life plans, it nevertheless allows the state a robust aretist function. Our state can and does impose all sorts of value-preferences upon its citizens, in all kinds of ways. Every redistribution involves an implicit preference for one allocation of wealth over another. Anti-pollution laws express a preference for cost-internalization, if not ecological integrity; expenditure on highways comes at the expense of mass transit. Taxing the wealthy to benefit the poor implies a preference for the latter; limiting the poor to food stamps, lest they buy alcohol and cigarettes, expresses a preference for nutrition over addiction. This kind of "retail aretism" is essential to all but the stingiest night watchman state, and entirely consistent with all but the farthest-right liberal principles.

The problem for Constitutional liberalism is aretism that is not "retail" but "wholesale." Constitutional liberalism allows a majority to impose all sorts of preferences *among* the preferences that all citizens act upon. What it discountenances is the majority's imposition upon all citizens of preferences *about* preferences. To see this distinction more clearly, consider the case of addictive substances: cigarettes, alcohol, and other drugs. The liberal state can ban them, and has; the liberal state can impose prohibitively high taxes upon them, and has. More to our present purpose, the liberal state can "speak" against these substances, in several ways. Most basically, it can inform its citizens of their disfavored legal status, in order to improve

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307, 322 (1982) (suggesting that the state may owe those involuntarily confined as mentally ill a right to the training minimally adequate to avoid being placed in physical restraints).

<sup>140</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (refusing to treat poverty as a suspect class triggering strict scrutiny and thus declining to compel Texas to reallocate resources for education to produce greater equality of expenditures among districts).

<sup>141</sup> See PETTIT, *supra* note 130, at 241–70 ("Civilizing the Republic").

compliance with the law. Thus the liberal state can certainly say “Sales of alcohol and cigarettes to minors are illegal”; “driving while drinking is a serious offense.” Having mandated that drivers wear seatbelts, the state may then post this billboard: “Buckle up. It’s the law.” Indeed, the state must make all of its commands available to its citizens somewhere, as a corollary of the basic rule-of-law requirement that there can be no punishable offense in the absence of a legal prohibition: *Nullum crimen sine lege*.

Beyond that, the liberal state can inform its citizens that consumption of these substances has extra-legal effects of which they may be unaware, and which they may want to avoid. Hence, the standard wording on cigarette packages is “Warning: The Surgeon General has determined that smoking is hazardous to your health”; thus, too, the far from over-easy old television spot: “This is your brain; this is your brain on drugs.” The state thus takes a position on a range of human conduct, as a means of encouraging or discouraging it.

Cases like this, though, have a distinctly limited form. They recommend or condemn conditionally: If you’re concerned about your health, then you shouldn’t smoke; if you want a healthy baby, then you shouldn’t smoke or drink while pregnant. They pose, that is, hypothetical imperatives, and hypothetical imperatives of a fairly limited scope. They tend not to proffer the way to be a good citizen, much less to be a good person or to have a good or meaningful life. In a sufficiently bland, “have a nice day” form, some such message might be permitted by our Constitution and adopted by one of our democratic legislatures. If the message became particularly pointed, however, or came too close to requiring individual endorsement, it would run afoul of current constitution doctrine,<sup>142</sup> itself grounded in basic liberal principle: the state cannot compel fundamental personal commitments.

Precisely how restrictive this principle should be is hotly contested, both in American constitutional law and in liberal theory. This should come as no surprise. It involves a liberal limit on democratic government, and thus a trade-off between liberalism and democracy that neither alone, nor the two together, can resolve absolutely. Depending on the vigor of one’s liberalism, relative to one’s democracy, one will draw the limit more or less strictly. Here we need to see where Constitutional liberalism places that line. Later we will examine how contested that line is in liberal theory.

Constitutional liberalism clearly allows the state to mandate that its citizens’ children study the basic skills and work habits necessary to support themselves as adults in our economy and polity. The state can mandate, not merely offer, training in the values and skills of the liberal democratic state and, by extension, the economic system it has chosen to adopt.<sup>143</sup> The state may thus undertake to bring all of its citizens up to the starting line, in both the polity and the economy, at least minimally enabling all to “play the game(s).” “Give a person a fish and you’ve provided a meal; teach a person to fish and you’ve provided a living.” The principle is intensely pragmatic. If the state does not see that each child is taught to fish, or at least cut bait, the state may well find itself feeding all too many of those children when they grow up.

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<sup>142</sup> See *Keller v. State Bar of Cal.*, 496 U. S. 1 (1990) (mandatory bars cannot constitutionally use dues to take positions on issues not of common interest to all members); *Morrow v. State Bar of Cal.*, 188 F.3d 1174 (9th Cir. 1999), *cert. denied* 528 U. S. 1156 (2000) (mandatory bar association may take positions on matters not of common interest to all members if dissenting members can get pro rata refund of dues).

<sup>143</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 213 (“There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.”).

This involves a dramatic “aretist” decision in favor of something like “equality of opportunity.” It could also involve a fairly large measure of redistribution, in the form of state-subsidized education for those unable to afford it,<sup>144</sup> at least enough to ensure mastery of the three “Rs” adequate for political dialogue and economic bargaining.

Constitutional liberalism also allows the majority to require that citizens’ children be taught, not only the skills and values necessary to succeed in a liberal democratic state with a capitalism market economy, but also the belief that this kind of polity and economy are themselves good.<sup>145</sup> A fortiori, it can require its teachers to teach these beliefs.<sup>146</sup> This belief in the virtue of America’s current social institutions is the take-home lesson of much of what is called “civics education” in the United States today. Congress subsidizes the inculcation of these beliefs fairly generously,<sup>147</sup> and state and local governments include various forms of them their mandatory curricula, albeit in a haphazard and much-debated way.

But beyond this teaching of skills and values, Constitutional liberalism draws a very clear line: the state cannot require anyone, teacher or student, to accept these beliefs as his or her own. Constitutional liberalism distinguishes sharply between requiring the teaching that our system is good, on the one hand, and requiring personal affirmation of that teaching, on the other. The state, that is, can require that all students be taught that our system is good, in the hope that the students will adopt that belief, but it cannot require them to adopt that belief as their own. Thus the children of Jehovah’s Witnesses cannot be required, over their and their parents’ objections, to pledge allegiance to the national flag, or to the belief-system of the nation for which that flag stands.<sup>148</sup> As Justice Jackson wrote for the majority in that case:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.<sup>149</sup>

Nor is that the only limit that Constitutional liberalism imposes on this critical aspect of the state’s aretist function, its effort to make its citizens’ children better, as defined by a political majority. Although the state can insist that all children be prepared for adult life, the limit on the preparation it can mandate over parental objection on religious grounds<sup>150</sup> is pretty severe. Quite

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<sup>144</sup> This does not imply public schools; vouchers for other schools could do the job. As we shall see, *infra* Part III, the criteria for making this choice are quite significant for our analysis.

<sup>145</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) (“National unity as an end which officials may foster by persuasion and example is not in question.”).

<sup>146</sup> See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925) (“No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.”).

<sup>147</sup> Email from Chuck Quigley & Mark Molli, Directors, Center for Civic Education, to undisclosed recipients (Feb. 4, 2010, 14:01 EST) (on file with author) (urging contacting of members of Congress to continue federal support).

<sup>148</sup> *W.Va. State Bd. of Educ.*, 319 U.S. at 624 (1943) (overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)).

<sup>149</sup> *Id.* at 642; see also *id.* at 646 (“Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full.”).

<sup>150</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1975) (“A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.”).

literally, it is the kind of education required to function on a nineteenth century family farm – more specifically, the Three “Rs” and the sort of civics we have already mentioned, up to but not through high school.<sup>151</sup> Furthermore, the state cannot require that even this be taught in its own schools. Parents can meet the state’s requirement of this level of education at schools of their own choice,<sup>152</sup> perhaps even at home,<sup>153</sup> subject to state certification.

It is important to bear in mind that even this “equality of opportunity,” appealing though it is as a liberal and democratic criterion of aretist redistribution, is not required by either democracy or liberalism (and, as we shall see, is in considerable tension with the latter’s neutrality principle). To the contrary, even this level of education is a concession that Constitutional liberalism makes to democracy and a benefit democracy confers upon its citizens only because a majority wills it. It is compelled by neither Constitutional liberalism nor democracy.<sup>154</sup>

Thus, even in so obviously an important matter as inculcating our society’s value in the next generation, a matter of fundamental importance to classical political philosophy, Constitutional liberalism is absolutely silent. Nor does its silence end there. Constitutional liberalism is also silent on whether citizens be given any positive assistance at all. Our Constitutional liberalism is long on liberty and equality, in the strictly negative sense of protecting citizens from state intrusions into their lives and the state’s own invidious discrimination in conferring any benefits the majority may decide to offer. But Constitutional liberalism is completely lacking in fraternity, in requiring our state to lend its citizens any sort of guiding, much less helping hand.

*ii) Theoretical Liberalism: The Embarrassment of Riches.*

America’s Constitutional liberalism, of course, nowhere nearly exhausts the possibilities of liberalism writ large. It is the legal instantiation of but one particular set of possible positions on the long spectrum of liberal theory. That spectrum runs from libertarianism’s night watchman state on the right to social democracy’s welfare state on the left. What we need to see here is that, on the question of guidance for the state’s optimal exercise of its redistributive and aretist functions, theoretical liberalism leaves us with quite the opposite problem from that of Constitutional liberalism. Even as Constitutional liberalism gives too little guidance, theoretical liberalism gives too much.

Before examining that embarrassment of riches, we need to briefly note an ironic reversal of positions between Constitutional and theoretical liberalism. On the related issue of the liberal state’s minimum level of aretist redistribution, theoretical liberalism requires less, not more. The basic reason is this: theoretical liberalism, unlike Constitutional liberalism, need not involve democracy.

Liberalism, we need to remember, does not necessarily imply democracy. In fact, as the lessons of recent elections in the Middle East should remind us, democracy can produce quite

<sup>151</sup> See *id.* at 211 (“Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life.”).

<sup>152</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>153</sup> See *supra* note 139.

<sup>154</sup> See *Kadrmas v. Dickinson Pub. Schools*, 487 U.S. 450, 462 (1988) (“The Constitution does not require that such a service [education] be provided at all, and it is difficult to imagine why choosing to offer the service should entail a constitutional obligation to offer it for free.”).

illiberal results. Conversely, distinctly undemocratic regimes can be quite liberal. Although our national mythology tends to obscure the fact, an “enlightened monarch” may be more easily kept within the bounds of liberal law than a fanatical democracy, whatever the source of its fanaticism, even as the ancients foresaw.<sup>155</sup> Gibbon makes this point with particular eloquence about the Roman emperors:

The forms of the civil administration were carefully preserved by Nerva, Trajan, Hadrian, and the Antonines, who delighted in the image of liberty, and were pleased with considering themselves as the accountable ministers of the laws. Such princes deserved the honor of restoring the republic had the Romans of their days been capable of enjoying rational freedom.<sup>156</sup>

In both the Classical world and the Enlightenment, Gibbon reminds us, the substance of liberty was valued more highly, in theory as well as in practice, than the forms of democracy.

In contrast to a democracy, a liberal state need have no electoral machinery. An absolute monarch, with full executive and legislative powers, could be limited by liberal principles. As Gibbon implies, the principal institutional constraint on such a non-democratic liberal state is the law. The job of the judiciary, as in Marshall’s vision in *Marbury*,<sup>157</sup> would be to declare what the law is and to keep both the legislative and executive powers, whether elected or not, within the bounds of the liberal constitution. It would have to guarantee that the laws promulgated by the monarch were implemented in an even-handed, rule-of-law manner. It would also have to guarantee the basic negative rights of liberalism. Of course, the liberal state, like every state, would have to provide basic internal order and external defense. But a minimalist liberal state would need only a monarch, a judiciary, an army, and a police force. None of this implies much in the way of wealth redistribution, aristocrat or otherwise.

Liberal theory covers a wide spectrum, from the libertarian right to the social democratic left. With respect to the two market-supplanting functions of government, the redistributive and the aristocrat, this produces an equally wide range of possibilities. Indeed, much of what determines how “right” or “left” a liberal theory is comes down to how much wealth redistribution it calls for, and how much encouragement of a theory of the good it countenances. From the perspective of the standard theory, this wide range of liberal positions amounts to no guidance at all.

(a) *Wealth Redistribution: Anywhere from Almost None to Very Much.*

The libertarian right wing of liberal theory calls for nothing more than the Ricardian, night watchman state. Based on this theory, the only justifiable redistribution is the minimum requirement for the barest-boned skeleton necessary to sustain a capitalist market economy and a liberal democratic polity.<sup>158</sup> By contrast, at least some left-liberal theories call for major redistributions of wealth, in order to achieve goals like equality of opportunity or at very least to supply basic human needs. Moreover, some left-liberalisms may allow even more redistribution than they require, perhaps beyond what we have identified as the redistributive ceiling, the point

<sup>155</sup> PLATO, *THE REPUBLIC* 233–40 (Allan Bloom trans., Basic Books, Inc. 1968) (describing the dangers of democracy); ARISTOTLE, *POLITICS*, *supra* note 50.

<sup>156</sup> EDWARD GIBBON, *I THE DECLINE AND FALL OF THE ROMAN EMPIRE* 54 (Modern Library ed. 2003). In many important ways, the late Habsburg Empire was just such an undemocratic liberal state. To cite a particularly poignant example, when Jewish refugees from the First World War were denied accommodations by the people of Vienna, Franz Josef offered to house them in the Schönbrunn Palace.

<sup>157</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>158</sup> See EPSTEIN, *supra* note 16; see also ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

at which the state's redistribution kills, or starves, the productive capacity of market capitalism's geese. Thus, to look to liberalism for guidance on the state's redistributive function is to find not too little, but too much.

That said, theoretical liberalism, even on its left, commends aretist redistribution with a measure of awkwardness, if not embarrassment. As modern republican theorists have observed, all liberalism has a problem generating positive functions for the state.<sup>159</sup> In part, this may derive from liberalism's core commitment to non-interference; on this view, "[I]f liberals are concerned with issues of poverty, ignorance, insecurity and the like, as many are, that is usually because of commitment independent of their commitment to freedom as non-interference: say, a commitment to the satisfaction of basic needs, or to the realization of a certain level of equality between people."<sup>160</sup> But the problem may lie deeper still. Liberalism's commitment to non-interference may not only imply little if any redistribution. It may, more fundamentally, severely restrict such redistribution. The reason for this has to do with liberalism's neutrality principle, to which we now turn.

*(b) Liberal Aretism: From Oxymoron to Neo-Aristotelianism.*<sup>161</sup>

The deep ambivalence of liberal theory, even on the left, about mandatory wealth redistribution lies in one of liberalism's defining principles – neutrality toward life-plans, basic conceptions of the good.<sup>162</sup> For a political theory to have a positive, mandatory program for wealth redistribution, it must have an account of what purposes wealth redistribution is to serve, what good it is to do. As we have seen, all wealth redistribution is aretist. If it is to be minimally rational, it must be designed to make the post-redistribution world in some identifiable way better than the pre-redistribution world.<sup>163</sup> Economists thus call for redistributions of wealth to support a regulatory regime that ensures economic efficiency, or wealth maximization. Democracy similarly calls for those redistributions of wealth for which a majority of citizens voted. Liberalism can in principle, and does in our own law, restrict majoritarian redistributions. To call for its own redistributions, however, liberalism would have to embrace what it essentially eschews: a particular vision of the good.

In its purest and most aggressive form, the neutrality principle would permit no state intervention whatsoever in the marketplace of ideas about the good life. In these matters, the state would have to remain strictly neutral. On this view, the liberal state could, for example, ban cigarettes and, beyond that, tell its citizens that cigarettes are bad for their health. It could not, however, urge its citizens to choose a healthy, tobacco-free lifestyle. To go beyond informing citizens to the point of urging them to improve themselves by the state's own view of the good life would be to take a non-neutral position toward what the good life is. By extension, the liberal state could not urge upon its citizens the belief that liberalism itself is good.

At the farthest right, the reason is this: There is no common good as such; there is only the aggregate of those goods that individual citizens seek. Thus, the state can have no aretist

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<sup>159</sup> PETTIT, *supra* note 130, at 9.

<sup>160</sup> *Id.*

<sup>161</sup> For a more general analysis of the problems raised in this section, see the essays collected in *VIRTUE, PART III, LIBERALISM, NEUTRALITY, & LIBERAL VIRTUES* (John Chapman & William Galston eds.) [hereinafter *VIRTUE*] and *WILLIAM GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* (1991).

<sup>162</sup> See Stephen Macedo, *Charting Liberal Virtues*, in *VIRTUE*, *supra* note 161, at 204, 211 ("The distinction between public and private spheres of life, like the allied beliefs in the fundamentality of disagreement and in neutrality, is apt to close off the possibility of liberal virtues.").

<sup>163</sup> *Supra* Part II.B.

function. There is no “better” for its citizens to be, except as they individually decide to be, by what lights they themselves choose to see and follow. For the state to suggest otherwise is either for it to talk nonsense or, worse still, for it to press the naked preferences of a majority against the individual wills of its other citizens.<sup>164</sup>

At the opposite end of the liberal spectrum, left-liberalism’s less pure and aggressive version of the neutrality principle would allow the state at least as much intervention into the marketplace of ideas about the good as Constitutional liberalism.<sup>165</sup> The state could take quite active steps, not only to enable citizens to live what the majority believes to be the good life, but also to encourage citizens to believe that a particular social system is itself good. It could, for example, promote market capitalism and liberal democracy. The outer limit would be requiring citizens to profess belief in any such system upon pain of legal penalty.<sup>166</sup>

Thus theoretical liberalism’s positions on aretism run from libertarian right-liberal prohibition of any state activity in the marketplace of ideas to the rather robust recruitment campaigns of the liberal left. Here again, as with wealth redistribution, theoretical liberalism gives too much, rather than too little, guidance.

*(c) Theoretical Liberalism’s Basic Problem: Unlimited Limits.*

Redistribution and aretism are closely correlated functions. All redistribution entails the implicitly aretist premise that the market’s own distribution can be improved upon. Conversely, any program to make citizens better off will almost certainly entail redistributions of wealth. On the critical matter of guiding redistributive aretism in the democratic state, liberalism comes up quite short. How short depends on how rigorously one interprets its neutrality principle. The strictest version would call for something like laissez-faire capitalism; the most permissive would press toward socialism itself.

*3. THE GOVERNMENTAL SECTOR’S FUNCTIONS AND FAILURES: THE BALANCE SHEET.*

The governmental sector complements the for-profit sector in four distinct ways: these are its Ricardian, regulatory, redistributive, and aretist functions. The first two functions provide the essential foundations of market capitalism and help the for-profit sector overcome market failures, failures of the market to meet its own internal metric, economic efficiency. Even here, liberal democracy poses a problem of its own. A majority of voters may choose to ignore the internal metrics of market capitalism. They may fail to provide the minimum infrastructure that capitalism requires, or they may decline to regulate up to the point of maximum economic efficiency.

This latter may reflect, not the majority’s lack of economic savvy, but its embrace of other values. The state’s other two functions, the redistributive and the aretist, allow it to produce outcomes other than giving consumers what they are willing and able to pay for. The redistributive function allows the state to transfer wealth from the haves to the have-nots, increasing the latter’s “ability to pay,” with an eye toward distributive equity instead of allocative efficiency. The aretist function allows the state to encourage production of goods and service that are desirable on a standard other than simply what consumers want.

<sup>164</sup> See PETTIT, *supra* note 130, at 9 (“Self-described libertarians tend to think of the people as an aggregate of individuals – an aggregate without a collective identity – and they represent the state as ideally nothing more than an apparatus for accommodating individuals in the pursuit of their atomized concerns.”).

<sup>165</sup> See JOHN RAWLS, A THEORY OF JUSTICE 424-33 (1971) (adopting an Aristotelian conception of the good).

<sup>166</sup> See Macedo, *supra* note 162, at 229 (“[L]iberals, even classical liberals, need not insist on disabling governments from educating for citizenship,” although “liberals are not Spartans, a liberal society is first and foremost a free society, and liberals should not tolerate an oppressively educative state even when it purports to be educating for liberal ideals like autonomy.”).

Nonetheless, these last two functions, redistribution and aretism, unlike the Ricardian and the regulatory, imply no precise metrics of their own, and none can be derived from the two distinctive features of our governmental sector, democracy and liberalism. Indeed, in its redistributive and aretist functions, the liberal democratic state can potentially undercut market capitalism itself, starving or killing the goose that lays its golden eggs.

Economics gives us a very clear function for the for-profit sector: maximize consumer satisfaction, and provides a very precise metric for assessing performance, economic efficiency. That is the perspective of market failure theorists. Political science<sup>167</sup> gives us an even simpler standard for the governmental sector: meeting majority demand (within the constraints of Constitutional liberalism). That is the perspective of government failure theorists. But both those metrics leave us with essentially the same question: Can we find a vision of the common good, and a measure of the aretist redistribution needed to advance that good, other than aggregate consumer demand and median voter preference?

The very posing of that question points to a possible source of answers. To ask how the combined performance of the for-profit and governmental sectors might be enhanced by a metric other than their own implies that we are already looking elsewhere for both goals and measures. We are, that is, already looking toward another sector, the philanthropic sector.

### C. THE NONPROFIT, VOLUNTARY SECTOR: OUR PLURALISTIC PHILANTHROPY.

The standard model sees the philanthropic sector as addressing market and governmental failures, but conceived much more narrowly than set out above. In the traditional model, market failures only involve economic efficiency, and government failures only involve failures to meet supra-majority demand or optimal productive efficiency. The market only fails to produce the optimal level of goods for which consumers are willing and able to pay. The government only fails to supplement that production at levels that satisfy citizens who want more than the majority votes for, or produces those levels with more inputs than are strictly necessary.

Our analysis has considerably expanded the notion of both market and government failure. We have shown that the market can be said to need supplementing, not just to correct classic “market failures,” but also to guarantee its essential infrastructure. What is more, the state sometimes supplants, rather than supplements, the market by redistributing wealth and encouraging excellence. We identified four governmental functions vis-à-vis the market. Our particular state has four shortcomings of its own – weaknesses traceable to the same sources as its strengths. Our state is nonprofit, non-voluntary, democratic, and liberal. This ordering of analysis tracks that of the standard model and suggests that the philanthropic sector might perform those functions that both the for-profit and governmental sectors perform inadequately. The philanthropic sector would need to offer a backstop to all failing functions, with its own metric for the performance of each.

In filling that order, the philanthropic sector confounds more than it disappoints. On the one hand, the philanthropic sector provides many goods and services undersupplied by the other sectors, and it offers finely calibrated metrics for its own performance. On the other hand, these twin advantages produce their own embarrassment of riches. The philanthropic sector offers both multiple and inconsistent visions of which sectors should provide which goods and services, with correspondingly varied metrics of functional performance. This brings us to the fundamental problem of the standard model: the choice among sectors for a particular job often

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<sup>167</sup> By this I mean the descriptive side of modern politics, as opposed to its normative side, political theory.



involves a judgment, not about how well a sector does that job, but about what that job is and whether a particular sector should be doing it at all.

This section begins by following the trajectory of the standard model, tracing the function of the philanthropic sector as meeting the failures of the other two public sectors. More specifically, it shows how the philanthropic sector can supplement those short-comings of the market that the state itself fails adequately to address, principally artist redistribution, on account of liberal democracy's own functional limitations. We then examine the functional limitations of the philanthropic sector itself. Like those of the for-profit sector and the governmental sector, these limitations are the correlatives of the philanthropic sector's essential characteristics: Its membership is voluntary; its mode of operation, nonprofit. This is why the philanthropic sector speaks with many voices, none of which need be heeded and all of which are likely to be under-funded.

### *1. THE PHILANTHROPIC SECTOR'S FUNCTIONS.*

Our capitalist market economy has four limitations that the state's four functions address. When the state fails in any one of these functions, the philanthropic sector can, and often does, step in to pick up the slack. Following our earlier analysis,<sup>168</sup> we will examine first the state's two market-supporting functions, the Ricardian and the regulatory, and then examine the state's market-supplanting functions, the redistributive and the artist. Finally, we will consider philanthropy's government-supplanting functions in which it tends to displace the state, even as the state's market-supplanting functions displace the market.

#### *a. The Philanthropic Sector and the State's Market-Supporting Functions, Providing Infrastructure and Correcting Classic Market Failures.*

Market capitalism has two significant internal problems: most basically, it cannot provide its own institutional pre-conditions; beyond that, it sometimes fails to provide efficient allocation, primarily on account of externalities and information asymmetries. The state's Ricardian and regulatory functions address these problems. Though market capitalism cannot solve these problems, it gives for each a viable, if by no means simple, metric for the state's two market-supplementing functions: Spend on both infrastructure and regulation until the last "corrective" dollar produces exactly one dollar more in net "efficiency."

To see how nonprofits may help the state address both these problems, lack of infrastructure and inefficiency, consider two particular sets of goods and services, elementary education and the protection of property. Let's begin with property protection, which seems, at least on first face, the most basic, the "service" on which capitalism most depends. Only the state, as we have seen, can create the legal institutions of private property; without that, there is no property, and no capitalism. But, as our shopkeeper example illustrated, enforcement of the law is another matter. People can protect their own property, thus relying on the household sector, or they can hire guards, relying on the for-profit sector. But hiring private guards, we saw, produces external benefits; the guard you post outside your shop will discourage theft at my neighboring shop as well. Private guards, accordingly, will likely be under-supplied in the for-profit sector. Here, as we saw, the government can step in, taxing the entire community to pay for an umbrella of police protection that covers, and thus benefits, the whole community. But, as we have also seen, a democratic government may choose not to provide the appropriate level of police protection, either to sustain the minimal property protection for a capitalist economy to exist or the likely higher level of police protection necessary for that economy to operate efficiently. Here the philanthropic sector can step in and supplement both the market and the

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<sup>168</sup> See *supra* Part II.B.

state. That in effect, is what neighborhood watches do. Of course, citizens' groups are not limited to watching out for street crime, they can also "watch the watchers," monitoring the performance of the government itself.<sup>169</sup> One way to improve the performance of public schools, we have seen, is for parents to form Parent Teacher Associations.

Our second example, public education is itself a governmental sector response to perceived undersupply of a vital service by the for-profit sector. An educated workforce is a more productive workforce, and the literate and numerate make not only more skilled workers and but also more sophisticated consumers. Knowing the three "Rs" is thus good not only for the educated themselves, but also for all of the rest of us, conferring external benefits. But, precisely because for-profit producers cannot capture these benefits, it is unlikely that the market alone will provide enough education for a fully efficient market. This, again, would be an appropriate place for the state's intervention but, yet again, the democratic state might fall short. This would be another place for the philanthropic sector to supplement both market and government failure. If, as is likely, private individuals do not buy enough education in the market, and if the state does not adequately tax and spend to make up the difference, then the philanthropic sector can make up at least some of the difference with voluntary contributions of money, labor, or other critical inputs.

This meeting of market failures that government itself fails to meet, under the market's own criteria of economic efficiency, is an important aspect of what the standard theory sees as the philanthropic sector's function. This is the dual role identified by the complementary market and government failure theories.<sup>170</sup> Philanthropies provide goods and services that are undersupplied by for-profit firms on account of classic market failures and that the state supplies only up to the level that satisfies the majority of voters. Philanthropies thus offer significant advantages in meeting the infrastructural and inefficiency problems of the market that the government also has problems addressing.

*b. The Philanthropic Sector and the State's Market-Supplanting Functions, Redistributing Wealth and Promoting the Common Good.*

Markets can also fail – or less pejoratively, need supplementing – for very different reasons: not for lack of infrastructure or for inefficiency, but because sometimes those very allocations are inadequate by other criteria than economic efficiency. Remember that economic efficiency is giving those who can pay what they want at the lowest possible price. But sometimes we want goods to go to those who cannot pay, and sometimes we want goods produced that are not sufficiently appealing to the private consumer. These concerns call for the state's other two functions, redistribution and aretism.

Here the liberal democratic state meets its most severe limits. Democracy's function is to provide what the majority wants, and liberalism provides no clear guidance on telling the majority what to want. What is worse, the liberal democratic state has no obvious metric for aretist redistribution beyond sustaining the minimal conditions of market capitalism and liberal democracy. Democratic majorities could ignore any available metric; any effort to restrict

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<sup>169</sup> Steven Rathgeb Smith & Kirsten A. Gronberg, *Scope and Theory of Government-Nonprofit Relations*, in *THE NONPROFIT SECTOR* 231 (Powell & Steinberg ed., 2006) (noting that "voluntary associations can promote transparency and accountability in government and thus improve the quality and effectiveness of government services") (citation omitted).

<sup>170</sup> See JAMES DOUGLAS, *WHY CHARITY?* 160 (1983) (referring to early versions of the standard theory as "the twin failure theory").

majoritarian preferences by such a metric would run afoul of liberal limits on the state's promotion of ultimate value systems.

Here again, the philanthropic sector has much to offer – too much, as we shall soon see – as a supplement to the government's market-supplanting functions. The philanthropic sector is not only a means by which our society supplements the levels of production that the market and state alone would provide. It also provides metrics by which to assess the appropriate levels of social production. Every citizen, functionally speaking, is a member of the philanthropic sector as well as a consumer in the for-profit sector and a citizen in the governmental sector. As a member of this third sector, every citizen can contribute to making up deficiencies in the provision of goods or services by the market and the state, using the market's metric of efficiency.

Here we need to see something quite different that the philanthropic sector offers. The citizen can also acquire from the philanthropic sector standards by which to measure both the appropriate level of social spending on such goods as property protection and education and the appropriate level at which to contribute to make up any deficiencies. Individuals and organizations in the philanthropic sector can provide just such standards. Many religions, for example, urge their members to give a certain amount of their resources to meet social needs. Many philanthropic organizations, secular as well as religious, provide their members with standards of how much – or little – to expect the state to provide where the market fails, and how much (or how little) other social institutions should provide when the market and the state both fail.

Thus, the philanthropic sector produces and transfers standards that supplement those of the market on the one hand and the government on the other. Why is producing and promoting these standards the peculiar province of the philanthropic sector? Precisely because of the market and governmental limits we have identified. Individuals “acquire” these standards in the philanthropic sector, and individuals and institutions in the philanthropic sector “provide” them. The mode of transferring these standards is important, for it points to a vital aspect of the philanthropic sector's role here. These standards are not typically available from for-profit suppliers, because they are public goods;<sup>171</sup> they are not typically available from the liberal democratic state because that state is doubly constrained. As a democratic state, it is not likely to promote ideas seriously at odds with those of a majority; as a liberal state, it is limited, to a greater or less extent, in promoting any particular vision of the good ordering of society or the good living of individual lives. That is precisely what standards from the philanthropic sector entail.

### *c. The Philanthropic Sector's Government-Supplanting Function.*

We have seen that the philanthropic sector can supplement both the state's market-supplementing and market-supplanting functions. It can provide goods and services beyond the demand of the marginal voter, and it can produce substantive standards of both equity and excellence not readily available to liberal democracy. In addition, theorists of “government failure” have also noted another set of philanthropic functions, one that we can now see is more distinctive. We will group together this set of functions as philanthropy's government-

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<sup>171</sup> See Susan Rose-Ackerman, *Altruism, Nonprofits, and Economic Theory*, 34 J. ECO. LIT. 701 (1996); Rob Atkinson, *Problems with Presbyterians: Prolegomena to a Theory of Voluntary Associations and the Liberal State*, Chapter 6 in FOUNDATIONS OF CHARITY (2000). See also Steinberg, *supra* note 5, at 129 (noting that, although “[g]overnment and for-profits also play roles in seeking to change preferences,” “much more research should be conducted on the distinctive roles best played by each sector”).

supplanting functions, even as we grouped redistribution and aretism together as government's market-supplanting functions. Just as the government's market-supplanting functions have to do with the fundamental function of the market, giving consumers what they are willing and able to pay for, so, too, philanthropy's government-supplanting functions all have to do with essential features of the liberal democratic state.

Nor is that the end of the structural similarities. Philanthropy's government-supplanting functions run along a spectrum from least to most radical that nicely parallels the spectrum of government's own market-displacing functions. Pure redistribution is minimally disruptive of the market's own functioning; it simply gives some consumers more money with which to buy what they want. Aretist redistribution restricts, more or less aggressively, consumers' choices among products they themselves want. At the extreme, the government can replace for-profit provision of a particular good or service altogether, what we called "retail socialism." Even more radically, the government can displace for-profit production in the entire economy, with "wholesale socialism." So it is with philanthropy's government-supplanting functions. The least radical of these edge out government's least critical functions, producing goods or services. The most radical would displace government's core functions altogether. As state socialism is to market capitalism, philanthropic anarchism would be to the liberal democratic state.

For analytic purposes, it is easier to start at the other end of the spectrum, with the least radical of philanthropy's state-supplanting functions. Sometimes philanthropies provide goods or services beyond the level the marginal voter demands. In that sense, they "top up" provision of products that the government itself supplies. Now we need to look at that "topping up" from a different perspective. Since the government could, were demands of marginal voters higher, provide these products itself, we can see this "topping up" as supplanting potential government provision at those higher levels. What factors, we need to ask here, lead voters to make this trade-off between government and philanthropic providers? Basically, two related factors: lower cost and superior quality. Sometimes philanthropies provide essentially the same products as government but at lower costs; sometimes philanthropies provide products in ways that consumers and voters prefer.

Consider, first, philanthropy's cost-saving function:

Let us say, for example, that a denominational school is as committed as a public-sector school to providing the most promising students with an education their parents can afford (or whatever may be the rule by which its mission is defined). But the public school will have to do this in a way it can defend publicly and politically. Thus it is likely develop fairly rigid rules – such as specified qualifications, income limits for parents, and so on. It will also have to keep elaborate records and adopt elaborate procedures to ensure that the rules are in fact applied. The philanthropic school, on the other hand, because it is not legally and politically bound to its rules in the same way, can be more flexible in how it operates. It can rely on more subjective criteria and trust more in the judgments of its officials.<sup>172</sup>

The example illustrates a form of government failure.<sup>173</sup> "In the matter of costs, the more elaborate administration of the public-sector institution inevitably is more expensive." This more elaborate and expensive administration is an essential consequence of state instrumentalities in a liberal democracy, as a matter of both Constitutional procedural due

<sup>172</sup> See Douglas, *supra* note 43, at 46.

<sup>173</sup> See *supra* Part II.B.2.

process and, even more basically, liberal “rule of law” norms.<sup>174</sup> Because philanthropies are not, by definition, instrumentalities of the state, they are not, *ex hypothesi*, subject to these constraints, and can thus reduce the costs of governmental bureaucracy and administrative “red tape” by following rules that are more lax in terms of equity, for example. This philanthropic advantage is, in a sense, a special case of productive efficiency. Philanthropies, as non-state institutions, avoid costs of bureaucracy that agencies of the liberal state cannot. Thus, on this analysis, both private and public funders may turn to philanthropic providers to avoid the cost of state bureaucracy.<sup>175</sup> In that sense, philanthropies supplant, not just supplement, government provision.

Sometimes the attraction of philanthropies over government agencies is not about avoiding bureaucratic costs and being more productively efficient. Sometimes the philanthropic producer delivers its product in a way that consumers prefer. This is analogous to the notion that philanthropies are in some amorphous but appealing way, “kinder,” “gentler” or “more caring” than for-profit competitors, particularly in an industry like health care. Researchers have found, for example, that “Voluntary bodies could make contact more easily with certain classes of clients, such as ethnic and cultural minorities and drug and child abusers, where a social stigma is attached to receiving services from governmental agencies.”<sup>176</sup> Philanthropy’s freedom from governmental bureaucracy may have more general advantages; “[s]pontaneity . . . can release that style of human warm and loving care that a generalized pattern of defensible rules tends to crush.”<sup>177</sup> By offering a greater diversity of suppliers, each offering differences in product that, though difficult to measure, are nonetheless appealing to discernible differences in consumer preference, this aspect of philanthropy’s government-supplanting is said to be socially beneficial.

This advantageous diversity has a dynamic aspect as well. Philanthropic suppliers may offer, not just a variety of alternatives to state provision at any one time, but also a greater variety over time. Philanthropic providers are sometimes said to be more innovative than either their governmental or for-profit counterparts, on account of structural advantages over both. Private providers have to look for new products they can sell at a profit, and thus not get too far ahead of consumer demand and investor risk-aversion. Governmental providers must be careful not to get too far ahead of voter sentiment. By contrast, philanthropic providers are limited neither by the economic obligation to make profits for investors nor the political obligation to please the marginal voter. Their innovations can thus be more economically and politically risky and potentially more rewarding.<sup>178</sup>

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<sup>174</sup> See Douglas, *supra* note 43, at 46 (“The democratic state has to treat all its citizens equally, which is what we mean by equality before the law.”); *id.* at 49–50 (“These needs – to ensure equality of treatment throughout a jurisdiction and to be able to defend its decisions politically – together generate the morass typical of bureaucratic red tape...the rigidly rule-bound requirements and restraints that [state] administrators are almost forced to impose . . .”); WEISBROD, *supra* note 2, at 25 (“In a democratic society, government must make its services available to everyone who meets certain conditions – the ‘equal access’ constraint.”).

<sup>175</sup> See Douglas, *supra* note 43, at 50 (“The relative freedom of the private voluntary sector from bureaucratic constraints is so well established that governments frequently use the device of subsidizing existing voluntary bodies (or establishing new ones) to carry out functions somewhat protected from the usual requirements of political accountability.”)

<sup>176</sup> *Id.* (citing RALPH KRAMER & PAUL TERRELL, SOCIAL SERVICE CONTRACTING IN THE [SAN FRANCISCO] BAY AREA (1984)).

<sup>177</sup> See Douglas, *supra* note 43, at 46.

<sup>178</sup> See John Simon, *Charity and Dynasty Under the Federal Tax System*, 5 PROB. L. 1 (1978). See also Atkinson, *supra* note 31 at 586, n. 235, and 605 n.291 (collecting citations for this position).

It is important to see that this preference for philanthropic over state provision has a peculiar subset, a limiting case. Some prefer to deal – as donors or purchasers or beneficiaries – with philanthropies rather than with the state, not because of the advantages we have identified, but simply because philanthropic suppliers are not instrumentalities of the state. In some cases, this may be no more than a matter of taste (although, like most matters of taste, it may be traced back to its source even if it cannot be given a rational basis). But sometimes the preference for non-state producers has to do with principled opposition to aspects of the state qua state. Every state is coercive and monolithic; the minimum attributes of a modern state are a monopoly of legally sanctioned violence within its boundaries. For those who dislike the state's coercive means of financing its operations, taxing and spending, philanthropies offer an obvious appeal: Their support is entirely voluntary. Even more, to those suspicious of the state's expansion, philanthropic provision of goods and services has the attraction of limiting the size of the state. Here, philanthropy's supplanting of the state in the provision of any particular good or service is not an ancillary aspect of that provision. It is, rather, the major source of its appeal.

There is a final point to be noted, though we will have to defer its elaboration until later.<sup>179</sup> Philanthropies do not just cater to these anti-statist preferences by acting as alternatives to governmental providers. Some philanthropies create and sustain precisely those anti-state preferences.<sup>180</sup> As we have seen,<sup>181</sup> one of philanthropy's market-supplementing functions is to provide the kind of over-arching worldviews that both the liberal state and the capitalism market are inherently hampered in supplying. We need to see that a subset of these ideological products are those ideologies that oppose the state itself. For example, right-liberalism calls for a minimalist, Ricardian state. At the extreme, anarchism calls for no state at all, what we might see as the total supplanting of the state by one or more of the other two sectors.

All states are coercive, and all modern states are monolithic; as we have seen, those are two essential aspects of the state's "nonvoluntary" status, and thus of the state itself. And all liberal states are, to a great or lesser extent, both value neutral and bureaucratic; those are essential aspects of what it means to be liberal. To the extent, then, that philanthropies provide an alternative to these essential features of the state, they do not merely supplement the state; to a greater or lesser extent, they supplant it.

On this analysis, the philanthropic sector both fills a critical gap left by the market and the liberal democratic state and serves a function uniquely its own – providing a vision of the common good beyond aggregate consumer demand on the one hand, and the preferences of the marginal voter on the other. These are philanthropy's government-supplementing functions. Philanthropy can also supplant government functions, even as government can supplant market functions. With respect to both government-supplementing and government-supplanting functions, the philanthropic sector can provide quite precise measures of how well those functions are being performed.

All of this should be very good news. Here is a source for the qualitative standard and quantitative metric we have been looking for. Here, too, is a kind of organization that provides ordinary goods and services in ways that avoid at least some of the limitations of both for-profit firms and governmental entities. But, as I have forewarned, that is only half of the story; now the other shoe must fall. The philanthropic sector provides not just one such uber-metric, but

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<sup>179</sup> See *infra* Part IV. C.

<sup>180</sup> See *infra* Part IV. C.

<sup>181</sup> See *supra* Part III.C.1.b.

many. The philanthropic sector may either incur many of the same costs as the other two sectors or pose new costs of its own

## 2. THE PHILANTHROPIC SECTOR'S LIMITATIONS.

Organizations in the philanthropic sector are voluntary and nonprofit. These defining characteristics combine to give philanthropies certain advantages over for-profit organizations and governmental entities. Because they are nonprofit, they can provide goods and services under-supplied by the market, owing to garden-variety market failures. Because they are voluntary, they need not heed either the demands of majoritarian politics or the constraints of liberal constitutionalism, substantive or procedural. They can offer goods and services that the majority undervalues, like education, and they can offer “products” that the liberal state cannot supply, like religions and other “holistic” value systems, without violating liberalism’s neutrality principle. They can also offer all these products without the “rule of law” limits under which the liberal state must operate, which, in their implementation, often involve costly bureaucratic systems.

But that, again, is only half the story. A complete analysis of the philanthropic sector reveals that the glass is half empty as well as half full. The very sources of its relative advantages – nonprofit operation and voluntary membership – also impose serious limitations, relative disadvantages vis-à-vis the for-profit and governmental sectors. These are the basic sources of “nonprofit failure.”<sup>182</sup>

### a. Nonprofit Limitations.

We have already encountered one problem of nonprofit status in our analysis of that aspect of the governmental sector. Without the inducement to increase net revenues they can distribute to themselves, those who control nonprofits lose an important incentive both to minimize production costs and to innovate in the goods and services they produce.<sup>183</sup> Although nonprofit organizations use various strategies to reduce this problem,<sup>184</sup> none can eliminate it entirely. Moreover, the nonprofit constraint denies philanthropies an important source of capital in the first place: private investment motivated by the prospect of residual claims on net profits.<sup>185</sup> Along with that source of internal incentives and external investors, philanthropies also lose the monolithic goal of profit maximization. Even as they lose an easy definition of

<sup>182</sup> Also known as “voluntary failure”; see Lester M. Salamon, *Partners in Public Service: The Scope and Theory of Government-Nonprofit Relations*, in *THE NONPROFIT SECTOR: A RESOURCE HANDBOOK* 99, 111 (Walter W. Powell, ed. 1987). Salamon summarizes the philanthropic sectors failings this way: “It is limited in its ability to raise an adequate level of resources, it is vulnerable to particularism and the favoritism of the wealthy, it is prone to self-defeating paternalism, and it has at times been associated with amateur, as opposed to professional, forms of care.” *Id.* at 113.

<sup>183</sup> See Hansmann, *Economic Theories*, *supra* note 28, at 38; Hansmann, *The Role of Nonprofit Enterprise*, *supra* note 28, at 878; WEISBROD, *supra* note 2, at 14–15, 23. See also Steinberg, *supra* note 5, at 118, 127–30 (noting mixed empirical data on the extent to which nonprofit managers succumb to this problem). See also Fama & Jenson, *Agency Problems and Residual Claims*, 26 J. L. & ECON. 327 (1983) (noting mechanism nonprofit firms have developed to address this problem).

<sup>184</sup> See, e.g., WEISBROD, *supra* note 2, at 23 (“[I]f managers of nonprofits derive relatively greater personal satisfaction than their proprietary counterparts do from providing a particular service, then there would be an incentive for nonprofit managers to be efficient even though they cannot benefit financially.”).

<sup>185</sup> Hansmann, *The Rationale for Exempting Nonprofit Organizations*, *supra* note 28, at 72–74. See also Walter W. Powell & Rebecca Friedkin, *Organizational Change in Nonprofit Organizations*, in *THE NONPROFIT SECTOR* 180, 181 (Powell & Steinberg, ed. 2006) (noting that “fundamental differences between nonprofit and for-profit

function, so they forfeit an extraordinarily straightforward metric of performance – maximizing the difference between production cost and sales price. Once an organization takes upon itself any purpose other than maximizing a profit, it must find another metric for measuring how “well” it is doing that particular “good.” Hence the perennial question of philanthropic operation: If not for profit, for what?<sup>186</sup>

*b. Voluntarism’s Limitations.*

As their nonprofit status places philanthropic sector organizations at a several disadvantages over against for-profit firms, so their voluntary status places them at several disadvantages over against the state. Unlike citizens of the modern state, members of philanthropic organizations are not born; they have to be created or recruited. Even after affiliation with philanthropies, members are free to leave. This is a particular problem with philanthropic finance. Unlike the state, philanthropies can only tax those who choose to be taxed, and only at the level each member determines to be satisfactory. As a result, philanthropies are profoundly hampered in their capacity to raise capital and redistribute wealth.

Voluntariness also imposes real limits on philanthropies’ promotion of their particular vision of the public good. Their methods are purely persuasive. They cannot make nonmembers (or members) listen, much less, obey.

The voluntariness of the philanthropic sector has another, complementary aspect. Just as philanthropies must recruit their members non-coercively, the liberal state cannot compel or forbid individuals from uniting for whatever purposes they like. Philanthropies are voluntary, not only because they cannot force membership; they are also voluntary because the state cannot keep philanthropic sector organizations from forming for virtually any legal purpose. This must, under our own Constitutional liberalism, include forming to promote whatever view of the public good that members can agree on among themselves, no matter how distasteful this may be to the majority of voters.<sup>187</sup> In a nation first populated by dissenters and dissidents and repeatedly infused with more of the same, this has meant that our philanthropic sector offers a wide range of competing visions of the public good.

This is bad news for our search for both a unified field theory of philanthropy’s function and monolithic metric of philanthropic performance. As we have seen, philanthropies function not just to supplement the state’s functions, but also to supplant them. The proffered reasons for displacing the state with philanthropies to a greater or lesser extent are all highly contestable, and hotly contested. Some advantages of philanthropy over the state appeal only to those who prefer a smaller governmental sector and a larger philanthropic sector. Consider, from this perspective, the much-vaunted efficiency of philanthropy as compared to government. We first treated that as a special case of productive efficiency, getting the same output at lower costs in inputs by eliminating bureaucratic red tape. Now we need to notice that this assessment tends to overlook two important facts.

First, as a leading proponent of philanthropic efficiency concedes, “Voluntary organizations themselves are of course not totally free of bureaucratic constraints; there is always someone – be it trustee or contributors – to whom their executives are accountable.”<sup>188</sup> Whether

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organizations” include “differences in the availability of resources and the constraints associated with their acquisition”).

<sup>186</sup> See DENNIS R. YOUNG, *IF NOT FOR PROFIT, FOR WHAT?* (1983).

<sup>187</sup> See *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964) (recognizing right of association for lawful purposes under First and Fourteenth Amendments, following *NAACP v. Button*, 371 U. S. 415 (1963)); see also *Bush v. Holmes*, 919 So. 2d 392 (2006).

<sup>188</sup> Douglas, *supra* note 43, at 50.



philanthropies actually produce the same output with less cost in bureaucratic rigmarole is very much an empirical question. Some evidence suggests that philanthropies' supposed savings in administrative costs are false economies, about as penny-wise as producing cheaper cars by removing seatbelts or decreasing household expenditures by cancelling fire, flood, or health insurance. To cite an early exponent of philanthropy's promise of greater efficiency, philanthropic services are often faulted for their lack of accountability, as well as "inadequate management . . . , poor personnel practices, weak budgeting . . . , and inadequate record keeping."<sup>189</sup> Thus, at best, philanthropy's asserted advantage in efficiency may really involve "a trade-off between accountability in the public sector and flexibility and diversity in the private [nonprofit] sector." Difficult though it may be to strike that balance in practice, it could be straightforward enough in principle. Shift functions from the governmental sector to the philanthropic sector until the savings in administrative costs are offset by the losses to shirking, stealing, and other aspects of mismanagement.

Here we come to the second fact often ignored in making the case for philanthropy's supposedly greater efficiency. Sometimes what is touted as a saving in production cost, and thus an advantage in productive efficiency, is in fact a difference in kinds of output. We have identified one aspect of this already. Some consumers see philanthropic supplies as "kinder" or "gentler" than either their governmental or their for-profit counterparts. Now we need to notice that this difference can cut the other way. What can look, from one perspective, like savings in bureaucratic costs, can be seen from another, as producing an inferior product or short-changing other values: a workplace that is less safe, employment practices that are less fair, productive processes that are less transparent, decision-making that is less democratic. The employees of philanthropies do not have civil service protection. That doubtlessly lowers philanthropies' production costs; it also means their employees have less secure jobs. The security firm formerly known as Blackwater doubtlessly operates with much less administrative red tape, for example, employee protections, than the armed forces of any NATO member. But the jury may literally still be out on whether that lowering of operating costs held constant civilian casualties and diplomatic embarrassment.

To the extent that we delegate governmental functions to philanthropic organizations, we may simply be empowering private actors to exercise arbitrary power that liberal democracy cannot allow to government. Trading untrammelled private discretion for governmental regularity may, upon closer inspection, be the sort of bargain that appeals less to both liberals and fiscal conservatives and more to libertarians or anarchists. I address these issues in detail elsewhere.<sup>190</sup> The point to note here is that the standard theory, in purporting to describe the function of philanthropy as correcting failures in our other social sectors, cannot avoid these normative questions. In fact it tends to beg them.

### 3. *THE PHILANTHROPIC SECTOR'S FUNCTIONS AND FAILINGS: THE BALANCE SHEET.*

The philanthropic sector has, relative to the other two sectors, both strengths and weaknesses. Indeed, we can see with the philanthropic sector, as we saw with the other two sectors, that its very strengths are, in essence, the sources of its weaknesses. What sets it apart from the for-profit sector, the nondistribution constraint at the very the core of nonprofit status,

<sup>189</sup> *Id.* (citing RALPH KRAMER & PAUL TERRELL, SOCIAL SERVICE CONTRACTING IN THE [SAN FRANCISCO] BAY AREA (1984)).

<sup>190</sup> Rob Atkinson, *Philanthropy's Future: Questioning Today's Orthodoxies, Re-Affirming Yesterday's Foundations* (2011).

allows its constituents to overcome the kinds of market failure that beset for-profit firms in the production of a wide range of goods and services, particularly those that involve information asymmetries and positive externalities. On the other hand, that same nondistribution constraint comes at considerable costs in both operational directions and production incentives. Again, “If not for profit, for what?”

Similarly, the very voluntariness that sets philanthropic sector organizations apart from the state and its sub-units also seriously limits philanthropic organizations’ effectiveness. They lack the state’s power to aggressively redistribute wealth by the classic method, taxing and spending. And philanthropic sector organizations produce not a single definition of social problems and solutions, but a cornucopia of competing visions of the public good, and bad. Even as liberal democracy cannot produce a coherent and consistent vision of the way ahead, the philanthropic sector cannot help but produce many such visions, which point us in all the directions of both the political and economic compass. In defining the function of the philanthropic sector, the standard theory produces a paradox: In our society, the philanthropic sector is uniquely suited to assigning and assessing sectoral functions, but does not give a unique set of criteria, and at least some of the sets it does give are radically inconsistent with each other. Likewise, what some philanthropic sector organizations tell us is that our current arrangement of social functions is radically wrong. At the extreme, socialists would have us abolish market capitalism, even as anarchists would have us eliminate the modern state.

Quite understandably, architects of the standard model have taken as given both our capitalist market economy and our liberal democratic polity. Within those parameters, they have tried to define the function of the philanthropic sector. To the extent that the architects of the standard model take existing economic and political preferences as given, they run the risk of implicitly importing normative sanctions into what purports to be a purely descriptive account. To the extent that they are scrupulous in eschewing normative analysis, they leave us wanting exactly what we need: a means of assigning and assessing philanthropy’s function.

## II. CYCLICAL THEORY OF SECTORAL FUNCTIONS OR CIRCULAR ARGUMENT FOR SECTORAL PRIORITY?<sup>191</sup>

In our survey so far, when we reached the problems posed by a particular sector in performing its function, we turned to another sector for solutions. We began with the for-profit sector, then turned to the governmental, and, finally, to the philanthropic. When we reach the limits of the philanthropic sector, however, we have come full circle; for solutions to those problems, we will have to look back to the other two sectors<sup>192</sup> (or three, if we include the household sector). It is not that we have started in the wrong place. Rather, as we said at the outset, wherever we start, we are describing not a linear function, but a closed system. Had we begun, as some have done, with a different social sector, we would have described much the same cycle.

Consider starting with the philanthropic sector,<sup>193</sup> assuming that, in the absence of some problem there, philanthropies provide all goods and services, financing that provision with either

<sup>191</sup> I discuss this issue in detail elsewhere. Atkinson, 28 *ADVOCATES’ J.* 3 (2009); Atkinson, *supra* note 1.

<sup>192</sup> See Steinberg, *supra* note 5, at 127, “Closing the Circle: Reacting to Voluntary Failure” (“[W]e need now to specify how the other two sectors respond to this voluntary failure.”).

<sup>193</sup> See Salamon, *supra* note 182, at 99, 111 (“[T]urn[ing] this discussion [of sectoral functions] on its head, to reject the view that the voluntary sector is merely a residual response to failures of government and the market and to see it instead as the *preferred mechanism* for providing collective goods.”) (original emphasis).

donations or sales. From that perspective, the government's economic functions could be seen as themselves meeting a kind of "nonprofit failure." The government coerces payment only as needed to make up for shortfalls in what philanthropies receive as gifts or purchases. Similarly, government's political function is to let citizens, through the democratic process, set preferences, qualitatively as well as quantitatively. We indulge the preferences of the majority in matters of aretism and redistribution (and, for that matter, in the Ricardian and regulatory functions as well) exactly as much as the majority wants above philanthropic provision.

On this view, Constitutional liberalism serves to maintain a kind of "peaceful coexistence" among the competing ideologies of the philanthropic sector, forbidding them to use force among themselves, and forbidding the state to exercise too great a preference among the competitors. As for goods and services that neither the state nor the philanthropic sector produces particularly well, we leave them to the for-profit sector, with its greater sensitivity to individual consumer preferences and its stronger inducements to productive efficiency.

From this perspective, the governmental sector thus responds to "philanthropic sector failure," even as the for-profit sector responds to a re-defined form of "government failure," failure of the government to provide what the philanthropic sector failed to provide in the first place. Thus the for-profit sector, not the philanthropic sector, becomes the residual, rather than the primary, sector. As one scholar mused long ago (with a lyricism he now finds more than a little embarrassing), "on this view, the invisible hand of the market, operating without regard to need, is not the ideal, but a necessary stopgap where the helping hand of altruism, implementing conscious concern for need, has not yet reached."<sup>194</sup>

The standard account of the role of philanthropy is essentially a-historical. It generally fails to take account of path-dependence, of the significance, historically speaking,<sup>195</sup> of which sector actually did first undertake the provision of a particular good or service. Philanthropic hospitals came before for-profits, with effects we still feel today. Also, in the assignment of various goods and services to particular sectors, as in the assignment of colonies in the Western and Southern hemisphere, historical priority has significant normative implications. We tend to think, rightly or wrongly, that earlier claimants are not only first in time but also prior in entitlement.<sup>196</sup> Finally, and not least significantly, we tend to think of some claimants themselves as inherently superior to others, often on what are, at best, insufficiently examined grounds. Remember that the European explorers' planted their sovereign's flags and crosses, not in uninhabited lands, but in lands not occupied by Christian Europeans.<sup>197</sup> Something similar, we might imagine, lies behind the fate of the "public option" in the current health insurance debate. Health insurance has historically been the province of our for-profit sector and philanthropic sectors, with government playing a less visible, if not less important, role. More generally, philanthropic status can produce a pronounced "halo effect," surrounding organizations in the philanthropic sector with an aura of inherent moral, even economic, superiority.

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<sup>194</sup> *Atkinson, supra* note 31, at 638.

<sup>195</sup> See generally KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951).

<sup>196</sup> See *Johnson v. M'Intosh*, 21 U.S. 543 (1823) (stating international law of territorial acquisition as discovery followed by occupation).

<sup>197</sup> *Id.*

This suggests the advantage of a synoptic perspective, a way of seeing the relations of the various sectors not sequentially but simultaneously.<sup>198</sup> As we said at the outset, considering the function of one sector first may imply that that sector is indeed primary, and that proper recourse to other sectors is only by default. At very least, seeing the various sectors simultaneously may more accurately reflect that their respective functions are less about correcting failures and more about achieving optimal complement.

I suspect a change in perspective will reveal much more. A seriatim treatment of sectoral alternatives also tends to obscure a fundamental fact that we have already identified. Assignments of sectoral functions are often made, not found. Our choices about which goods and services to acquire from which sectors flow not only from the respective sectors' inherent strengths or weaknesses, but also from very real decisions, perhaps made in the forgotten past or unconsciously in the present, about how we want our social world to be: more reliant on one sector, and the modes by which it operates, more than others. From this synoptic perspective, we will see that sectoral assignments involve a good deal more normative choice, present or past, conscious or not, than the standard theory has implied. We will also see that, in ways the standard model tends to obscure, the bases of these choices ultimately lie in the philanthropic sector.

### III. TOWARD A SYNOPTIC PERSPECTIVE: ASSESSING THE THREE SECTORS SIMULTANEOUSLY.<sup>199</sup>

This Part views the three public sectors of our society, not separately, as a series of corrections each gives, in its turn, to failings of the others, but simultaneously, as alternative providers of virtually any particular good or service. From this perspective, we will first notice that all three sectors depend, for their very existence, on the other sectors. To use a term we have already employed in examining the for-profit sector, each sector provides essential infrastructure for the other two, even as each relies on the other two for its own infrastructure.

Against that background of mutual dependence, we re-examine the provision of two exemplary products, property protection and primary education, by each of the other three sectors. We will notice that these assignments involve measures other than those that the standard model suggests, measures that must come from the philanthropic sector. We will “get behind” what consumers pay for and what citizens vote for, tracing their preferences in both the marketplace of the for-profit sector and the voting booth of the governmental sector to the core of the philanthropic sector, the marketplace of ideas. We will, in that sense, sketch a much-abbreviated cultural history onto the standard model's generally a-historical account.

Even as we add a historical dimension to the standard model's macrocosmic analysis of society as a whole, we will add, in the final section, another dimension to its microscopic analysis of its individual members. We have already seen that philanthropies offer individuals various normative systems, each with its own assessment of the proper relations and functions of

<sup>198</sup> I am by no means the first to see the significance of this shift in perspective. See, e.g., Steinberg, *supra* note 5, at 129–34 (outlining an “integrated approach, where all the various pieces are mutually consistent and jointly establish the respective roles of each sector”).

<sup>199</sup> For a survey of similar efforts to supplement the standard model with a more synoptic approach, see Smith & Gronberg, *supra* note 169, especially their summary of two other theoretical approaches, *Model II: Civil Society and Social Movements*, *id.* at 229–33, and *Model III: Regime and Neo-Institutional Perspectives*, *id.* at 233–38, each with at least two significant subdivisions of their own. See also Steinberg, *supra* note 5, at 129–34 (noting the inadequacies of the “three failure” theory and outlining his own “integrated approach,” building self-consciously on the work of still others).

our society's three sectors. Here we notice that philanthropies do not merely meet the individual's demand for such systems; they also shape that demand itself. The philanthropic sector, from that view, does not merely give us an array of models and measures of preferred social arrangements from which individuals are free to choose. Particular philanthropies also shape individuals to prefer the specific social arrangements they offer.

#### A. SECTORAL INTERDEPENDENCE: EACH SECTOR PROVIDING THE OTHERS' INFRASTRUCTURE.

Starting our initial survey of the standard model with the capitalist market economy, we noticed that it depended, quite utterly, on the governmental sector to provide its essential infrastructure, a functioning legal system of property entitlements and their protection and exchange.<sup>200</sup> We are now in a position to see, more broadly, that all sectors of our society depend on each other in corresponding ways. We will flesh this out with the for-profit sector, then with the governmental and philanthropic sectors.<sup>201</sup> Our emphasis here will be on the reliance of all three sectors on the philanthropic sector. This is our emphasis, not because the philanthropic sector is in any absolute sense the most important, but because it is both the focus of our particular inquiry and the sector most often under-appreciated.

What we will have, in other words, will be the societal-sector equivalent of those peculiar maps of the world made mostly in Australia, with the South Pole at the top and the North at the bottom. From this perspective, Australia and New Zealand come out "on top" of Europe and North America (even as the South of our own country comes out on top of the North). Even as that change in the orientation of the map does not change the "facts on the ground," so reversing the orientation of our standard model may change nothing about the respective functions of the three public sectors of our society.

On the other hand, those "upside down" antipodal maps are not drawn up for nothing, nor do proponents of the philanthropic sector chafe for no reason at the suggestion that the philanthropic sector is, in some real sense, in third place, an after-thought in the accustomed sequencing of the standard account. How we orient the model does not change the world, but it does reflect how we look at the world. In geography, that may not matter much; there is, in a very real sense, no ultimate "up" or "down." But in politics and economics, as in culture, the orientation of the model may matter a lot; when it comes to the philanthropic sector, culture is much of what we are mapping.

##### 1. THE FOR-PROFIT SECTOR.

We have already seen how the for-profit sector depends on one of its sibling sectors – the governmental. The legal regime of private property is fundamental to a capitalist market economy. Less obviously but perhaps equally importantly, the for-profit sector also depends on the philanthropic sector. Since Weber's controversial thesis about the relationship between modern capitalism and Protestant theology,<sup>202</sup> scholars have noted that capitalism rests on a certain set of values that capitalism itself does not produce and that capitalism, left to its own

<sup>200</sup> See *supra* Part II.A.

<sup>201</sup> Here again, the household sector must get short shrift: On the one hand, all sectors obviously depend on households to produce the individuals who are its producers and consumers, its citizens and officials, and its members; on the other hand, households obviously depend on the other sectors for economic sustenance, legal protection, and cultural development.

<sup>202</sup> MAX WEBER, *THE PROTESTANT ETHIC AND THE "SPIRIT" OF CAPITALISM* (Peter Baehr & Gordon C. Wells, ed. and trans. 2002).

devices, may not be able to sustain.<sup>203</sup> In terms of the standard model, we can see this “culture of capitalism” as the product of a symbiotic relationship between the for-profit, governmental, and philanthropic sectors.

## 2. THE GOVERNMENTAL SECTOR.

Even as the for-profit sector depends for its legal infrastructure on the state, so the state depends, as a matter of historical fact, largely on the for-profit sector for its financial support. To recall our earlier metaphor, the for-profit sector is the goose that lays society’s golden eggs. In our society, the liberal democratic state subsists largely on revenues generated, directly or indirectly, by the capitalist market economy.

We are now in a position to see, as many others have observed,<sup>204</sup> that the liberal democratic state also depends on the philanthropic sector and that this dependence is even greater than its dependence on the private sector. Most obviously, a sufficient number of citizens must understand the basic “rules of the game” well enough to participate in liberal democracy, to make the system work.<sup>205</sup> This is the stuff of basic civics, the fundamental knowledge that the liberal democratic state can, and often does, insist that all its citizens acquire.

But knowing “the rules of the game,” no matter what the game, is never enough. Proper play always depends on something like “sportsmanship” as well. For democracy to survive, much less thrive, a majority of the voting population must be committed to democracy itself. This commitment must occur at two distinct levels, commitment to (1) “play by the rules” in each election and (2) keep the rules in place from election to election. These commitments rest on culture rather than law because the law cannot create them by fiat or coercion. The liberal state can mandate the teaching of liberal democracy’s virtues, but it cannot compel belief in those virtues.

Similarly, a liberal democracy can both forbid and prevent behavior that disrupts or corrupts elections – intimidation and fraud, for example. But democracy in principle does not require even that its electoral system function. A political majority might fail to provide adequate infrastructure. That would just seem like the expression of a majority desire not to have democracy or to have very shoddy democracy. The democratic minimum, like the market capitalist minimum, is a hypothetical imperative. If you want a liberal democratic government (like a market capitalist economy), you must provide basic infrastructure.

And, even with the electoral infrastructure in place, there is a deeper problem. A liberal democracy cannot require participation. If the polls are open, but no one shows up to vote, then democracy has failed. This prospect points to an even deeper cultural pre-condition that law cannot ensure: long-term commitment to democracy itself. The problem of citizens’ boycotting elections has a more aggressive, affirmative twin: showing up at the polls and voting against democracy itself. That, of course, is the point of the slogan, “One person, one vote, one time.” A fundamentally democratic government – a government that rests ultimately on the people’s

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<sup>203</sup> See KENNETH BOULDING, *THE ECONOMY OF LOVE AND FEAR* 28 (1973) (citing JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1942)); see also ROBERT L. HEILBRONER, *THE WORLDLY PHILOSOPHERS* 308–11 (summarizing Shumpeter’s theory that capitalism would eventually undermine the entrepreneurial society that created and sustained it) (4th ed. 1972).

<sup>204</sup> Macedo, *supra* note 162, at 204, 229 (“Thinkers as diverse as Friedrich Hayek, Irving Kristol, and Jurgen Habermas argue that the legitimacy and stability of liberal regimes is parasitic on the lingering presence of a precapitalist or preliberal ethic.”).

<sup>205</sup> See Letter from Thomas Jefferson to Joseph Cabell, Sept. 9, 1817, in 17 *WRITINGS OF THOMAS JEFFERSON* 417, 423–424 (Mem. ed. 1904) (proposing that state citizenship be conditioned on the ability to “read readily in some tongue, native or acquired”) (quoted in *Wisconsin v. Yoder*, 406 U.S. 205 at 226 n.14).

will as expressed in elections – also rests, even more deeply, on a culture of commitment to just such a system.

A liberal democracy is thus radically contingent on the culture of that state's population. If that population is itself committed to liberal democratic values, the state can be small indeed, and relatively inactive. It would need little more than the libertarian night watchman, state's independent judiciary to "watch the watchmen," at the behest of aggrieved citizens, to prevent the stealing of public elections. The stronger a state's liberal traditions, and the deeper its liberal culture, the less that state need depend on its laws. So deep is liberal democracy in the United Kingdom, nominal monarchy though it is, that it functions as a model of liberal democracy even without a written constitution.

Of course, the converse is also true. If the citizenry of a nominal liberal democracy is not committed to liberal values, then the state would have to be very active indeed. So weak was liberal democratic culture in post-war Germany and Japan that liberal democratic constitutions had to be imposed from outside and guaranteed by occupying armies. Surely this is at least one lesson we have learned in Iraq and Afghanistan. Nor need we go nearly so far afield to learn – or re-learn – that lesson. The states of the old Confederacy accepted the liberal civil war amendments – African Americans' freedom, citizenship, and enfranchisement – only at bayonet point (and only for as long as the bayonets were literally pointed). I say this most sadly as a child of South Carolina, the last state to come into nominal compliance, only after the notoriously compromised Presidential election of 1876.

This historical and cultural reality poses a real problem for liberal theory. Under some circumstances, liberalism is only possible where its values are imposed by force on an unwilling population. This points to a deep paradox in liberal theory: the need to maintain commitment to even the most basic of liberal institutions, equality before the law, without violating the most fundamental of liberal principles, neutrality among competing visions of the good.

The liberal democratic state is thus dependent, in the final analysis, upon a liberal democratic philanthropic sector. Indeed, the more serious the liberal state is about its neutrality principle, the core liberal commitment not to favor one set of fundamental values over another, the less the liberal state will allow itself to instill its own values even in its own citizens, and thus the more dependent it will be on the philanthropic sector to instill those values in its place. The liberal state may inherit its liberal culture by historical accident; more likely, liberal culture is the liberal state's parent rather than its patrimony, its creator and not merely its precondition. In a sense, this dependence of the liberal state on the philanthropic sector parallels the for-profit sector's dependence on the philanthropic. Just as the for-profit sector cannot create and sustain the ethos of market capitalism, but must rely upon the philanthropic sector's engendering of the basic entrepreneurial values like honesty, thrift, and deferred gratification, so the liberal state must rely on the philanthropic sector's engendering of basic liberal values like human equality and the rule of law.

### 3. *THE PHILANTHROPIC SECTOR.*

Mutual dependence is, of course, a two-way street. As the for-profit and governmental sectors both depend on the philanthropic sector for the skills and values essential to their proper functioning, so, in turn, the philanthropic sector depends, albeit in different ways, on both of them.<sup>206</sup>

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<sup>206</sup> See Smith & Gronberg, *supra* note 169, at 222 ("Perhaps not surprisingly, this [three failures] model presupposes the presence of a dominant market economy supported by democratic institutions.").

Speech and belief need to be free from both private violence and public coercion.<sup>207</sup> Without laws protecting freedom of expression and assembly, our philanthropic sector's essential "marketplace of ideas" would be no more possible than a commercial marketplace without parallel protection of private property. Protection of citizens from physical assault by their fellows and from repression by the state itself is to the philanthropic sector what protection against private theft and public confiscation are to the for-profit sector.

Less obviously, perhaps, the philanthropic sector also depends on the for-profit sector.<sup>208</sup> Financial support for the philanthropic sector comes, directly or indirectly, from the capitalist market economy. Donations to philanthropic sector organizations originate in earnings from the market. Government support comes largely from taxes on income earned in the for-profit sector. And philanthropies conduct their own profit-making operations as well.

Each of our society's three sectors – the for-profit, the governmental, and the philanthropic – is dependent for its barest existence as well as its optimal function on its sibling sectors. In turn, each sector provides the others with vital infrastructure that they cannot provide for themselves. This is all too easy to overlook with respect to the philanthropic sector, so firmly has it laid and maintained the foundations of both our liberal democratic polity and our capitalist market economy. In the next section we will see an equally significant, and equally often overlooked, contribution of the philanthropic sector: the blueprints we use to erect social institutions within all three sectors.

#### B. ANOTHER LEVEL OF ANALYSIS: PROVIDER OF SECTORAL PREFERENCES

We have just seen that the three public sectors of our society are mutually dependent. In the prior section we discussed that each sector has advantages and disadvantages, vis-à-vis the others, in providing various kinds of goods and services. We also saw in that section that each sector has its own metric by which to judge performance. The for-profit sector measures success by the metric of economic efficiency, the governmental sector by majority vote, subject to liberal constitutional constraints. For-profit firms must, and voters may, apply the measure of productive efficiency as well: getting the most output relative to input, the biggest bang for the buck. What we need to see now is that the social assignment of the provision of goods and services among sectors, and among organizations within sectors, is a much more complex matter than even our expansion of the standard model has yet indicated. Beyond that, we need to see that the reason for this complexity lies largely in the multiple orderings and metrics of value that the philanthropic sector gives us.

Returning to our earlier examples, primary education and property protection, will help us see why this is the case. These examples work nicely here for several related reasons. Both primary education and property protection are part of the infrastructure of each sector, and both of these services can, to a very large extent, be either financed or produced by any of the three sectors. Moreover, both services implicate many of the factors that go into choosing among the sectors, as well as the metrics for measuring performance.

Let us first reconsider property protection. It is obviously an essential service to all three sectors. In our prior survey, we noted that it can be provided by the state through its police force; by the for-profit sector through the hiring of private security guards; by the household

<sup>207</sup> *Id.* at 228 ("Thus authoritarian regimes can destroy civil society by reducing the ability and willingness of individuals to organize for mutual benefit of political purposes.").

<sup>208</sup> *Id.* at 223 ("Wealthy, developed, diversified economies provide a very different context for the nonprofit sector than that of developing societies dominated by subsistence agriculture and barter exchanges.").



sector through arming oneself and one's family; or by the philanthropic sector through forming a neighborhood watch.<sup>209</sup> As we saw before, property protection is likely to be undersupplied by the for-profit sector, on account of its positive externalities; the security guards that you and I hire for our shops will also make our street safer for Jones, down on the corner, without his having to pay. The state can address this problem, putting out more police by making Jones pay his fair share in taxes. If the state declines to take this step, you and I and other more community-minded neighbors can provide the extra protection we want with our neighborhood watch. We won't be able to overcome free-rider problems posed by Jones and his ilk to the same extent that the state can through its coercive power of taxation, but we can do a more economically efficient job together than apart.

But now we are in a position to ask a further question: Why doesn't the state, given its obvious advantage in terms of economic efficiency, provide the optimal level of police protection itself? The answer must have something to do with citizens like Jones: Are they simply too dumb, or too socially parasitic, to vote for the common good? Maybe, but there is more to be said. Perhaps Jones and others who favor lower levels of police protection than economic efficiency would dictate have more positive reasons for their preference. They may affirmatively favor small government over the larger government that economic efficiency calls for here; they may be principled libertarians, people who want only a minimal, Ricardian state. Or they may be the products of a culture where the police are not sources of security, but fear. In a police state, citizens do not generally think, as we do in our liberal democracy, of the police as their friends. Some of our citizens lived their formative years in just such places. Finally, we must not overlook the possibility that Jones may actually be an altruist, willing to forego the benefits to him of an increase in the police force for more or better public schools in poorer neighborhoods<sup>210</sup> or his own.

By adding this layer to our analysis, we can thus look behind the level of governmental provision that satisfies the government failure theory's marginal voter and ask why that voter does not want more, when more is warranted by economic efficiency. In answering that question, we must look to the philanthropic sector. But notice that, even in giving our philanthropic sector account for the votes of Jones and his fellow favorers of small police forces, we have only said why they voted as they did. We cannot say whether that decision was right or wrong, without transgressing the limits of descriptive analysis, the fundamental mode of the standard model. To say whether an inefficiently small police force is right or good, that is, we would ourselves have to move from describing the norms offered by the philanthropic sector to evaluating those norms themselves.

This problem becomes even more apparent when we re-consider the case of elementary education. You, Jones, and I began with a neighborly discussion about educating our own children.<sup>211</sup> We saw that each of us could do the job separately at our respective homes. I suggested that we specialize among ourselves by comparative advantage, with each of us teaching the "R" we know best to all our children, in a kind of cooperative school. Alternatively, we could send all our children to any one of several kinds of schools operated by others: philanthropic, public, or for-profit. When we first considered these options, we took into account

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<sup>209</sup> See WEISBROD, *supra* note 2, at 26 (noting that "[u]ndersatisfied demanders for collective-type services can turn to the private market for substitutes for the governmentally supplied outputs" and that "[u]ndersupplied demanders can also turn to the private nonprofit sector").

<sup>210</sup> See *supra* Part II.B.

<sup>211</sup> See *supra* Part II.A.

only our own satisfaction as consumers, which in this case meant getting our children the best of the three Rs for our parental bucks.

On the one hand, the for-profit school has a real incentive to minimize production costs. Its proprietors can keep any difference between production costs and selling price as profit. On the other hand, the for-profit school's proprietors have, for the same reason, a perverse incentive to cut corners, trading on our inability either to monitor their provision or to fully evaluate their product, and thus to over-charge us. And we consumers ourselves would likely be the source of another market failure, having to do with positive externalities. To the extent that elementary education, or at least certain school topics like civics, involve benefits to others than ourselves and our children, we might well be inclined to spend too little to produce an economically efficient level of production. Both state and philanthropic schools lack the for-profit incentive to short-change us, and both can give us tax- or donation-subsidized "discounts" that encourage us to buy more elementary education generally, or more publically-beneficial course offerings particularly, than we otherwise would.

Philanthropic and state schools also offer a way to address two other problems with home-schooling and for-profit schools, problems invisible to the market's metric of economic efficiency. Our poorest neighbors might not be able to afford either home-schooling or for-profit schools, and even families who can afford such schooling may omit certain "extra-curricular" courses, not because they hope to free-ride on the efforts of others, as with civics classes, but because they have little or no interests in those fields either for their own children or for society as a whole. Here, philanthropic and state schools can nicely supplement the market. They can provide free or below-market priced elementary education to the poor, and offer "culturally uplifting" "enrichment" courses like art and music at below-market rates to everyone. These are aspects of the state's redistributive and aretist functions, which the philanthropic sector can supplement.

Now we need to look more closely at several other aspects of this arrangement. Most obviously, there is no free lunch, at school any more than elsewhere. The full production costs of elementary education must be borne by someone. Our example implied that the costs of for-profit school would be paid by parents, the costs of public school by taxes, and the cost of philanthropic school either by parents as tuition or by others as donations. Our example further implied that our schools' relative advantages in economic efficiency were linked with their sources of finance. If you want to maximize productive efficiency, you choose for-profit schools. If you want to avoid information asymmetries and underproduction of external benefits, you choose philanthropic or state schools. You also chose these latter two if you want to ensure either redistribution of educational opportunity or "higher-brow" cultural offerings like art and music.

Now notice that these implied linkages between the provider of education and the funder of education are not essential.<sup>212</sup> This is the insight on which voucher systems rest. The state can subsidize education not only by "producing" education in its own public schools. It can also give parents vouchers to purchase education from either for-profit or philanthropic schools. This makes it possible to have one's cake and eat it, too: the productive efficiency of for-profit

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<sup>212</sup> See Salamon, *supra* note 182, at 110 ("The central problem with the theory of the welfare state as it has been applied to the American context is its failure to differentiate between government's role as provider of funds and direction and government's role as a deliverer of services."); see also MUSGRAVE & MUSGRAVE, *supra* note 6, at 9 ("[A] clear distinction must be drawn between public *provision* for social goods... and public *production*.") (original emphasis).

schools along with the provision of education to children whose parents cannot afford tuition. Who pays and who provides can be re-combined to the best advantage in various ways.

Nor is this the only linkage implied in our example that is not essential. To see another, recall the downside of for-profit schools. They may trade on information asymmetries to overcharge parents not well positioned to assess the teaching standards of different schools. To prevent that, our example offered state and philanthropic schools, which lack that perverse underside of the profit motive. Now we need to recognize other possibilities. We can impose state regulations on for-profit schools, even as we do on for-profit suppliers of other difficult-to-evaluate services like health care and legal advice. We can rely on philanthropic monitors like charitable accreditation associations to supplement or replace state regulation. Here again, we can consider a range of options, with an eye toward the most cost-effective, or productively efficient, combination.<sup>213</sup>

This brings us to a much more basic point. We need to remember that we reach the criterion of productive efficiency only after we made two logically prior determinations. We consider whether a particular supplier is cost-effective only after we have determined, first, that we want the product that it is supplying, and then, second, that we will accept that product from that supplier. With respect to elementary education, both these questions are quite often open. Some parents may not want education at all; some want it only from certain suppliers; some only want it financed from certain sources. As others have noted, this is true across the entire front – “Government-nonprofit relations are deeply immersed in political ideologies about the proper role of government, preference for market structures, and priorities accorded to values of fairness, equity, equality, choice, and/or opportunities.”<sup>214</sup>

We also need to remember that state coercion can apply on the demand side of education as well as the supply side. Even as the state can extract payment for education involuntarily, through the tax system, so it can also compel the consumption of education, through mandatory attendance policies.<sup>215</sup> The state is not limited, as our example has so far implied, to offering subsidized education to make it available to the poor and more attractive to the rest of us; it can, and does, compel us to educate our children through primary school, whether we want to or not. Constitutional liberalism does not permit the state to mandate education at government schools; parents are constitutionally entitled to educate their children at alternative schools, perhaps even at home. But the constitution does permit the state to mandate much of the content of primary education, and the mandatory curriculum may include not merely the three “Rs,” but also subjects like civics, art, and music that some parents may see as less than obviously useful. What is more, some parents may see these subjects not as frills, or even frivolities, but as positively harmful.

According to those parents they may well be right. Teach children to fish, we have said, and you have fed them for a lifetime. Teach the children of the Old Order Amish to fish with monofilament line in an aluminum reel on a fiberglass rod, and you have tempted them to sin, to transgress the accepted ways of their elders, to threaten their ancestral way of life.<sup>216</sup> The state

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<sup>213</sup> See *supra* Part II.B.

<sup>214</sup> Smith & Gronberg, *supra* note 169, at 222.

<sup>215</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

<sup>216</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 209 (1972) (citing the belief of Old Order Amish parents, which the state stipulated to be sincere, that for them to send their children to high school would “endanger their own salvation and that of their children”).

can, with the grudging permission of both their parents and the United State Supreme Court, insist that Amish children complete elementary school:

The Amish do not object to elementary education through the first eight grades as a general proposition because they agree that their children must have basic skills in the 'three R's' in order to read the Bible, to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of daily affairs. They view such a basic education as acceptable because it does not significantly expose their children to worldly values or interfere with their development in the Amish community during the crucial adolescent period. While Amish accept compulsory elementary education generally, wherever possible they have established their own elementary schools in many respects like the small local schools of the past.

But high school, public or private, is too much to ask, much less mandate. Old Order Amish parents, for whom the Supreme Court invalidated such a mandate "believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children." A post-secondary liberal arts education would, *a fortiori*, be anathema: "In the Amish belief higher learning tends to develop values they reject as influences that alienate man from God."<sup>217</sup> In the Amish belief, higher learning means high school, and a woman's proper occupation is housewife to her farmer husband, in a kitchen with neither electricity nor running water.

In light of the Yoder case, consider, again, our civics or social studies class. Many parents might be less than enthusiastic about paying for this course, seeing it as not worth their own money or their children's time. The liberal democratic state can nonetheless compel their children to take such a course, on the theory that the students themselves, and our society as a whole will be the better for their being informed about their own culture and those of other

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<sup>217</sup> *Id.* According to expert testimony for the Amish parents, on which the Supreme Court majority evidently relied,

Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.

Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. Once a child has learned basic reading, writing, and elementary mathematics, these traits, skills, and attitudes admittedly fall within the category of those best learned through example and 'doing' rather than in a classroom. And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. In short, high school attendance with teachers who are not of the Amish faith-and may even be hostile to it-interposes a serious barrier to the integration of the Amish child into the Amish religious community.

countries. Beyond that, the content of the course could be much more controversial. Should the children be told that, to succeed in our society (assuming that's what they and their parents want), they must study hard and stay in school? President Obama himself was excoriated for telling public school children very little more than that. Should school children be taught that all societies are equally valid and valuable, that lives of dependency are no less worthy than lives of productivity? That our liberal democratic and capitalist market system is the best of all, but that others should be tolerated? That our system is better, and should be exported, but only by peaceful means? Or by any means necessary, including "pre-emptive" war or "wars of liberation"?

For some citizens and consumers, then, any amount of publicly subsidized education is too much. This is a corollary of limiting the state to its Ricardian function alone. On this view, the state should not be redistributing wealth, even if the intended recipients are allowed to decline the proffered benefit; it is wrong to rob the rich, and perhaps inappropriate to importune the poor. Others, of course, see free public education as minimally necessary to equality of opportunity, and thus to even a modicum of social justice. On the far political right, some consider compelled education, whatever the content, to be an inappropriate state intrusion into the household or philanthropic sector. Many nearer the political center believe it to be the foundation of a viable and vibrant liberal democracy and market economy; some on the far left consider it inappropriate for precisely the same reason, for supporting a political and economic order they find oppressive.

Even if government provision could be shown to be more efficient, some citizens would still prefer other suppliers. They may not eschew government provision because it is productively inefficient; they may choose productively inefficient providers in other sectors because they are nongovernmental.<sup>218</sup> For cost-effective government provision comes, from the perspective of some, at one cost that is always too high: It proves that government can provide at least some benefits to its citizens cost-effectively.<sup>219</sup> Thus, it undermines the joke: "I'm from the government, and I'm here to help you." Stated nakedly, that position may sound paradoxical, even churlish; it counts what looks like a gain, governmental efficiency, as a loss. But, as the examples of elementary education and property protection illustrate, that position is often very highly principled. In the choice among sectors to provide even services as basic as these, one's meat is decidedly another's poison, all the more dangerous because all the more fundamental.

Religious opinion is no less polarized than political opinion, and the two are inseparable. Some among the Amish believe that for the state to fully enable their children to participate in a modern secular society would, over time, be tantamount to destroying their traditionally religious way of life; some secularists see the undermining of exactly these "family values" as an entirely appropriate effect, even purpose, of public education. If the Amish children decline to go back to their families' patriarchal farms once they have seen their fellow citizens' city of liberty, equality, and fraternity, so much the better.<sup>220</sup> In every nineteenth century French village were

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<sup>218</sup> Smith & Gronberg, *supra* note 169, at 228 ("The dominance of this particular ideology [holding that government crowds out initiatives in the other two sectors] is evident in the extent to which arguments to privatize government and reduce taxes carry the day in political discourse and public-opinion polls.").

<sup>219</sup> See *id.* at 228 ("[T]he contract system [of government out-sourcing to providers in other sectors] makes it more difficult for citizens to know that they benefit from government activities ... and thus undermines the legitimacy of taxes.") (internal citation omitted); see also Salamon, *supra* note 182, at 117 ("[R]eliance on nonprofits to deliver publicly financed services can undermine public objectives and inflate costs.").

<sup>220</sup> Rob Atkinson, *Reviving the Roman Republic: Remembering the Good Old Cause*, 71 *FORDHAM L. REV.* 1187 (2003).

two antipodal life-paths: The way of the parish priest and the way of the Republic's schoolmaster. In the *banlieues* of Paris today, the madrasas and the public schools stand even more obviously opposed. In one the boys and girls of France sit in the same classes, study the same curriculum, prepare for the same careers. No one wears a headscarf; perhaps more significantly, no one displays the cross of Christ or the Star of David. In many of the schools of the Prophet, of course, a different order obtains, even as different values are imparted. So, too, with schools devoted the Savior and the Torah, in the United States as well as in the French Republic.

Most of us embrace the wisdom of the Proverb, even if we have never heard its precise words: "Train up a child in the way he should go, and when he is old he will not depart from it."<sup>221</sup> But what the Philosopher said on the point is hardly as widely accepted as he himself believed, "That education should be regulated by law and should be an affair of the state is not to be denied . . ."<sup>222</sup> Aristotle conceded the point that we need to underscore:

Mankind are by no means agreed about the things to be taught, whether we look to virtue or the best life. Neither is it clear whether education is more concerned with intellectual or with moral virtue.<sup>223</sup>

And here he also implicitly makes another point, every bit as important to our analysis: We must address these issues not just as parents or as individual citizens and consumers within a given society, but also as legislators and theorists, attempting to analyze and improve that society itself. When we move from the level of the individual within the system to the level of system evaluator, we find essentially the same confusion, an identical normative cacophony.

Precisely here, of course, the parameters of both our theory and our law are radically different from Aristotle's. Our law, being fundamentally democratic and only negatively liberal, does not necessarily compel any measure of public education at all. Because the liberalism of our constitution is almost entirely negative, what little we have is a matter of majority preference, not constitutional mandate. Among the most basic of its prohibitions is mandatory embracing of fundamental values, the very values that would help us determine whether we should have public schools, and what they should teach.

Nor is our theory, at least the theory that underlies the standard model, any more helpful. It purports to be explanatory, not evaluative. It tells us what functions the various sectors are to serve, in order to advance certain ends. It even tells us how to measure how well those ends are being advanced. But it explicitly eschews telling us which ends are worthy of our choice, and, without knowing which ends we are to choose, we never reach the question of how well our institutions are working.

Here, a value-neutral, classically social scientific analysis must stop. It can deal in hypothetical imperatives, and it can explain preferences, even ideologically-based preferences, tracing them back to their sources in the philanthropic sector and its institutions' impact on individual lives. But it cannot, in its own terms, recommend preferences. It can tell us what we have done, and even why we have done it. But it cannot tell us if we have done well, except in

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<sup>221</sup> *Proverbs* 22: 6 (RSV). See also PLATO, *THE LAWS* (Benjamin Jowett, trans.) ("The soul of the child in his play should be guided to the love of that sort of excellence in which when he grows up to manhood he will have to be perfected.").

<sup>222</sup> ARISTOTLE, *POLITICS*, *supra* note 50, at 321 (bk. VIII, sec. 2); see also *id.* at 320 (bk. VIII, sec. 1) ("No one will doubt that the legislator should direct his attention above all to the education of youth; for the neglect of education does harm to the constitution."); see also PLATO, *THE REPUBLIC*, *supra* note 155, at 95 ("[I]t is fit to be sure about what we were saying a while ago, that they [the ideal city's rulers] must get the right education, whatever that is.").

<sup>223</sup> ARISTOTLE *POLITICS*, *supra* note 50, at 321 (bk. VIII, sec. 2).

terms of our expressed preferences. Most importantly, it cannot tell us what to do next. It can, however, reveal one final feature of our society that is critical to understanding the role of the philanthropic sector.

### C. THE PHILANTHROPIC SECTOR AS FORMATIVE AND FUNDAMENTAL.

At the beginning of this section, we saw that all three sectors are essentially inter-dependent. Each provides critical infrastructure for the other two. In particular, we saw how both our capitalist market economy and our liberal democratic state rest upon values derived from and sustained by our philanthropic sector. We have just seen how the philanthropic sector profoundly influences our choices about what goods and services to seek from which of the sectors. This built upon our earlier observation that the philanthropic sector's distinct product may well be visions of the good for both individuals and society.

Here we need to notice a dynamic aspect of the philanthropic sector's value-forming role. Before, our analysis implied that voters and citizens "acquire" guidance in their political and economic decisions from the philanthropic sector, as if they were the consumers of its products. To some extent, that is doubtlessly true. The philanthropic sector provides not only alternative producers of most of the goods and services available from the for-profit and governmental sectors, but also directions as to which products, and which providers, to prefer. Still, there is a deeper relationship between the philanthropic sector and individuals in our society. Now we need to recognize another role of the philanthropic sector, not just serving, but also shaping consumer demand and voter preferences. Citizens and consumers are themselves the products, as well as the consumers, of their culture. We have seen one aspect of this already, in the acculturating role of elementary schools. Civics classes are, at least in part, about making students better, not just better-informed, citizens.

As that example suggests, the liberal democratic state also plays a critical role, alongside the philanthropic sector, in advancing values and forming character. And so too does the for-profit sector through its ubiquitous advertising campaigns. Advertisements do not merely entreat us to buy Marlboro cigarettes or Ralph Lauren outfits. They also entice us to live the rugged, active life of the American West or the elegant, leisurely life of the English gentility, if only in the mode of Walter Mitty. For-profit firms are limited to changing preferences in order to increase profits, and our government is limited both by shifting majorities and by Constitutional liberalism in forming and pressing full-blown normative systems upon its citizens. Organizations in the philanthropic sector know no such limits. For some of them, shaping individuals' preferences – in classical terms, forming their characters – to serve shared social goals is their *raison d'être*. They give us the belief systems that shape us, the symbols and signs we rally to. Under one of their signs, Constantine conquered, like David before and Mohammed after; under signs of their own, so, too, would Hitler, Stalin, and Mao.

The demonstrable success of philanthropic organizations in their character-shaping enterprises points to another refinement we must make in the standard model. Membership in philanthropic sector organizations is voluntary, in a legal sense, but it is hardly unconditioned, in a psychological sense. This is, of course, especially true of children. That is the uncontested premise of the Yoder case. One need not embrace the full Calvinist doctrine of predestination to appreciate that I did not choose to join the Presbyterian Church as an infant. We Presbyterians baptize early and teach the catechism along with the primary colors, well before the alphabet.<sup>224</sup>

<sup>224</sup> See Robert Atkinson, *Problems with Presbyterians: Prolegomena to a Theory of Voluntary Associations and the Liberal State*, in *FOUNDATIONS OF CHARITY* (Charles Mitchell & Susan R. Moody, eds. 2000).

The Young Pioneers, the Red Guards, and the *Wandenvogel* all began a bit later, but did their best to make up for lost time.

Although Presbyterians are among the solidest of our society's citizens today, loyal liberal democrats and enterprising market capitalists, it is worth remembering that the Kirk and the state have not always been on such easy terms. The majority of the Long Parliament was Presbyterian, too, and the Long Parliament led the first phase of the Puritan Revolution that deposed the Stuarts and their notions of divine right monarchy. The Presbyterian Party balked, for better or worse, at the king's execution, but their fellow Calvinists under Cromwell established, albeit only briefly, an entirely new form of government, "a commonwealth or free state, without any king or House of Lords."<sup>225</sup> Patrick Henry had precisely this in mind, in the less remembered lines of his liberty or death speech: "Caesar had his Brutus; Charles I, his Cromwell – and George III would profit by their example." As Michael Waltzer has observed, Geneva and Rome were the Moscow and Washington of their day; Calvinists and Jesuits were the easily identifiable antecedents of our own highly disciplined radical political parties.<sup>226</sup>

To account for such developments, from the establishment of the Roman Republic to that our own and beyond, we must add another element to our understanding of the role of the philanthropic sector. Earlier in this section, we saw that role as largely supportive, providing the critical infrastructure of liberal democratic and capitalist market values. That supporting role is certainly true of our philanthropic sector as a whole, but it is not true of each of that sector's constituents. To the contrary, some call for radical alterations in all sectors, including the philanthropic sector itself.

The philanthropic sector is more than an under-appreciated continent at the antipodes of our social world, long due a turn at the top of an inverted globe. The philanthropic sector is better seen as something like the crust of the entire social world, the common stuff of all its landmasses, even the floors of its oceans. We experience that crust as reassuringly solid in its support of our present political and economic sectors, but in fact there is always subterranean motion, and sometimes-violent eruption, if mostly in places far from our points of observation. Once, those apparently solid points were molten and fluid. Now, they imperceptibly drift on a permanently protean substrate.

The philanthropic sector, on this view, does not merely perform the residual functions of the other sectors, thus ranking appropriately after them. Instead, it shapes the values that motivate candidates as well as voters, producers as well as consumers. It gives us both our ethics and our politics. If the philanthropic sector is on the bottom of our standard three-sector social model, that is because it is the foundation of our social world.

## V. CONCLUSION: PHILANTHROPY AS THE THIRD OF THREE SECTORS OR THE MEASURE OF ALL?

We came to the standard, three-sector model looking for the function of philanthropy in our society and hoping to derive from that function a measure of how well philanthropy is doing. We have found more than we were looking for, perhaps more than we want; not just one basic function of philanthropy, but two, or at least two perspectives on the most basic. From the perspective of the standard model, philanthropy is the third of three sectors; its general function is a residue of a residue. Students of our society's other two sectors consign philanthropy to the periphery of their own discipline's focal functions. From the economists' perspective, the

<sup>225</sup> Parliamentary Declaration, 19 May 1649.

<sup>226</sup> MICHAEL WALTZER, *THE REVOLUTION OF SAINTS: A STUDY OF THE ORIGINS OF RADICAL POLITICS* (1982).



function of philanthropy is to maximize economic efficiency, albeit in those odd corners of the market where for-profit production predictably fails. From the political scientists' perspective, philanthropy's job is to meet supra-majority demand, to "top-up" government's satisfaction of the majority's preferences. The basic need that philanthropy uniquely supplies, the need that both our market and our state provide least well, is for global norms, for the individual and for society – in classical terms, ethics and politics.

Both the political and the economic accounts are plausible, as far as they go. Together they give us the standard account of philanthropy. This article is built upon that model, correcting several of its critical omissions. Our detailed analysis has shown us that, even with these modifications, the standard account cannot give us all that we need. It cannot tell us, individually and collectively, how to choose among the very ethical and political systems that it shows us to be the philanthropic sector's most basic products. For that, we must rely on the standards of the philanthropic sector itself. When we adopt that perspective, the perspective of the philanthropic sector, we find that the global norms the philanthropic sector offer us are designed to assess not just philanthropy, but all of our social life, including our political and economic system.

We have also seen something more. We did not merely turn our analytic lens around, showing how philanthropy can measure the other two sectors. We also saw that philanthropy not only measures them, but also makes them, even as it makes us. From this perspective, we can see that what we came to measure may not only measure us, but also make us. A full articulation of the standard model, then, ultimately shows us this: Philanthropy, what the standard model sets out to define and measure, becomes not only the source of standards by which we measure everything, including ourselves and our social world, but also the shaper of both, according to its own standards.